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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1992

FEBRUARY 22 THROUGH APRIL 26, 1993

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WILLIAM H. REHNQUIST, Chief Justice.
BYRON R. WHITE, Associate Justice.[1]
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.

OFFICERS OF THE COURT

STEWART M. GERSON, Acting Attorney General.[2]
JANET RENO, Attorney General.[3]
WILLIAM C. BRYSON, Acting Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
SHELLEY L. DOWLING, Librarian.

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*For notes, see p. IV.

NOTES

[1] JUSTICE WHITE announced his retirement on March 19, 1993, effective "at the time the Court next rises for its summer recess."

[2] Acting Attorney General Gerson resigned effective March 12, 1993.

[3] The Honorable Janet Reno, of Florida, was nominated by President Clinton on February 11, 1993, to be Attorney General; the nomination was confirmed by the Senate on March 11, 1993; she was commissioned on March 12, 1993, and took the oath of office on the same date. She was presented to the Court on March 29, 1993. See *post*, p. VII.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective November 1, 1991, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, CLARENCE THOMAS, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

November 1, 1991.

(For next previous allotment, and modifications, see 498 U. S., p. VI, and 501 U. S., p. V.)

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 29, 1993

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE THOMAS.

THE CHIEF JUSTICE said:

The Court now recognizes the Acting Solicitor General, Mr. William C. Bryson.

Acting Solicitor General William C. Bryson said:

MR. CHIEF JUSTICE, and may it please the Court, I have the honor to present to the Court the Seventy-Eighth Attorney General of the United States, The Honorable Janet Reno of Florida.

THE CHIEF JUSTICE said:

General Reno, on behalf of the Court, I welcome you as the Chief Law Officer of the Government and as an officer of this Court. We welcome you to the performance of your very important duties which will rest upon you by virtue of your office. Your commission as Attorney General of the United States will be placed in the records of the Court and we wish you well in your new office.

Attorney General Janet Reno said:

Thank You, MR. CHIEF JUSTICE.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1992

UNITED STATES *v.* NACHTIGAL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–609. Decided February 22, 1993

Respondent was charged with operating a motor vehicle in a national park while under the influence of alcohol (DUI), a federal misdemeanor carrying a maximum penalty of six months' imprisonment and a $5,000 fine. As an alternative to imprisonment, a court may impose a probation term not to exceed five years. Relying on this Court's decision in *Blanton* v. *North Las Vegas,* 489 U. S. 538, a Magistrate Judge denied respondent's motion for a jury trial, concluding that DUI's maximum imprisonment term made it presumptively a "petty" offense which is not embraced by the Sixth Amendment's jury trial guarantee, and that the additional penalties did not transform it into a "serious" offense for Sixth Amendment purposes. Respondent was tried, convicted, and sentenced to a fine and one year's probation. The District Court reversed, holding that respondent was entitled to a jury trial under relevant Ninth Circuit precedent. The Court of Appeals affirmed, holding that *Blanton* was inapposite to respondent's case.

Held: The Court of Appeals erred in refusing to recognize that this case was controlled by the opinion in *Blanton* rather than its own precedent. Applying the *Blanton* rule, DUI, with its 6-month maximum prison term established by Congress, is presumptively a petty offense. The additional penalties imposed are not sufficiently severe to overcome this presumption, for neither a fine nor a parole alternative can approximate in severity the loss of liberty that a prison term entails.

Certiorari granted; 953 F. 2d 1389, reversed.

PER CURIAM.

Respondent Jerry Nachtigal was charged with operating a motor vehicle in Yosemite National Park while under the influence of alcohol, in violation of 36 CFR §§ 4.23(a)(1) and (a)(2) (1992). Driving under the influence (DUI) is a class B misdemeanor and carries a maximum penalty of six months' imprisonment, § 1.3(a); 18 U. S. C. § 3581(b)(7), and a $5,000 fine, §§ 3571(b)(6) and (e). As an alternative to a term of imprisonment, the sentencing court may impose a term of probation not to exceed five years. §§ 3561(a)(3), (b)(2). The sentencing court has discretion to attach a host of discretionary conditions to the probationary term. § 3563(b).

Respondent moved for a jury trial. Applying our decision in *Blanton* v. *North Las Vegas*, 489 U. S. 538 (1989), the Magistrate Judge denied the motion. He reasoned that because DUI carries a maximum term of imprisonment of six months, it is presumptively a "petty" offense which is not embraced by the jury trial guaranty of the Sixth Amendment. He rejected respondent's contention that the additional penalties transformed DUI into a "serious" offense for Sixth Amendment purposes. Respondent was then tried by the Magistrate Judge and convicted of operating a motor vehicle under the influence of alcohol in violation of 36 CFR § 4.23(a)(1) (1992). He was fined $750 and placed on unsupervised probation for one year.

The District Court reversed the Magistrate Judge on the issue of entitlement to a jury trial, commenting that the language in our opinion in *Blanton* was "at variance with the Ninth Circuit precedent of *United States* v. *Craner*, [652 F. 2d 23 (1981)]," and electing to follow *Craner* because our opinion in *Blanton* did not "expressly overrule" *Craner*. App. to Pet. for Cert. 17a, 20a.

The Court of Appeals for the Ninth Circuit agreed with the District Court, holding that *Blanton* is "[in]apposite," that *Craner* controls, and that respondent is entitled to a jury trial. App. to Pet. for Cert. 3a–4a, judgt. order reported at 953 F. 2d 1389 (1992). The Court of Appeals reasoned that since the Secretary of the Interior, and not Congress, set the maximum prison term at six months, "[t]here is no controlling legislative determination" regarding the seriousness of the offense. App. to Pet. for Cert. 4a; see also *United States* v. *Craner,* 652 F. 2d 23, 25 (CA9 1981). The court also found it significant that the Secretary of the Interior, in whom Congress vested general regulatory authority to fix six months as the maximum sentence for any regulatory offense dealing with the use and management of the national parks, monuments, or reservations, see 16 U. S. C. §3, chose the harshest penalty available for DUI offenses. App. to Pet. for Cert. 3a–4a; see also *Craner, supra,* at 25. Finally, the court noted that seven of the nine States within the Ninth Circuit guarantee a jury trial for a DUI offense. App. to Pet. for Cert. 3a–4a; see also *Craner, supra,* at 27.

Unlike the Court of Appeals and the District Court, we think that this case is quite obviously controlled by our decision in *Blanton.* We therefore grant the United States' petition for certiorari and reverse the judgment of the Court of Appeals. The motion of respondent for leave to proceed *in forma pauperis* is granted.

In *Blanton,* we held that in order to determine whether the Sixth Amendment right to a jury trial attaches to a particular offense, the court must examine "objective indications of the seriousness with which society regards the offense." *Blanton,* 489 U. S., at 541 (internal quotation marks omitted). The best indicator of society's views is the maximum penalty set by the legislature. *Ibid.* While the word "penalty" refers both to the term of imprisonment and other statutory penalties, we stated that "[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration." *Id.,* at 542. We therefore held that offenses for which the maximum period of incarceration is six months or less are presumptively "'petty.'" A defendant can overcome this presumption, and become entitled to a jury trial, only by showing that the additional penalties, viewed together with the maximum prison term, are so severe that the legislature clearly determined that the offense is a " 'serious' " one. *Id.*, at 543. Finally, we expressly stated that the statutory penalties in other States are irrelevant to the question whether a particular legislature deemed a particular offense " 'serious.' " *Id.*, at 545, n. 11.

Applying the above rule, we held that DUI was a petty offense under Nevada law. Since the maximum prison term was six months, the presumption described above applied. We did not find it constitutionally significant that the defendant would automatically lose his license for up to 90 days, and would be required to attend, at his own expense, an alcohol abuse education course. *Id.*, at 544, and n. 9. Nor did we believe that a $1,000 fine or an alternative sentence of 48 hours' community service while wearing clothing identifying him as a DUI offender was more onerous than six months in jail. *Id.*, at 544–545.

The present case, we think, requires only a relatively routine application of the rule announced in *Blanton.* Because the maximum term of imprisonment is six months, DUI under 36 CFR § 4.23(a)(1) (1992) is presumptively a petty offense to which no jury trial right attaches. The Court of Appeals refused to apply the *Blanton* presumption, reasoning that the Secretary of the Interior, and not Congress, ultimately determined the maximum prison term. But there *is* a controlling legislative determination present within the regulatory scheme. In 16 U. S. C. § 3, Congress set six months as the maximum penalty the Secretary could impose for a violation of any of his regulations. The Court of Appeals offered no persuasive reason why this congressional determination is stripped of its "legislative" character merely because the Secretary has final authority to decide, within the limits given by Congress, what the maximum prison sentence will be for a violation of a given regulation.

The additional penalties imposed under the regulations are not sufficiently severe to overcome this presumption. As we noted in *Blanton*, it is a rare case where "a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line." *Blanton*, 489 U. S., at 543 (internal quotation marks omitted). Here, the federal DUI offense carries a maximum fine of $5,000, and respondent faced, as an alternative to incarceration, a maximum 5-year term of probation. While the maximum fine in this case is $4,000 greater than the one in *Blanton*, this monetary penalty "cannot approximate in severity the loss of liberty that a prison term entails." *Id.*, at 542.

Nor do we believe that the probation alternative renders the DUI offense "serious."* Like a monetary penalty, the liberty infringement caused by a term of probation is far less intrusive than incarceration. *Ibid.* The discretionary probation conditions do not alter this conclusion; while they obviously entail a greater infringement on liberty than probation without attendant conditions, they do not approximate the severe loss of liberty caused by imprisonment for more than six months.

We hold that the Court of Appeals was wrong in refusing to recognize that this case was controlled by our opinion in *Blanton* rather than by its previous opinion in *Craner*. An individual convicted of driving under the influence in violation of 36 CFR § 4.23(a)(1) (1992) is not constitutionally entitled to a jury trial. The petition of the United States for certiorari is accordingly granted, and the judgment of the Court of Appeals is reversed.

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*There are 21 discretionary conditions which the sentencing court may impose upon a defendant. Under 18 U. S. C. §3563(b), a court may require, among other things, that the defendant (1) pay restitution; (2) take part in a drug and alcohol dependency program offered by an institution, and if necessary, reside at the institution; (3) remain in the custody of the Bureau of Prisons during nights and weekends for a period not exceeding the term of imprisonment; (4) reside at or participate in a program of a community correctional facility for all or part of the probationary term; or (5) remain at his place of residence during nonworking hours, and, if necessary, this condition may be monitored by telephonic or electronic devices. §§3563(b)(3), (b)(10), (b)(11), (b)(12), (b)(20).

It is so ordered.

UNITED STATES *v.* LOUISIANA ET AL. (ALABAMA AND MISSISSIPPI BOUNDARY CASE)

ON JOINT MOTION FOR ENTRY OF SUPPLEMENTAL DECREE

No. 9, Orig. Decided May 31, 1960, February 26, 1985, and March 1, 1988—Final decree entered December 12, 1960—Supplemental decree entered November 5, 1990—Supplemental decree entered February 22, 1993

Supplemental decree entered.

Opinions reported: 363 U. S. 1, 470 U. S. 93, and 485 U. S. 88; final decree reported: 364 U. S. 502; supplemental decree reported: 498 U. S. 9.

SUPPLEMENTAL DECREE

By its decision of February 26, 1985, the Court overruled the exceptions of the United States to the Report of its Special Master insofar as it challenged the Master's determination that the whole of Mississippi Sound constitutes historic inland waters, and, to this extent, adopted the Master's recommendations and confirmed his Report.

On March 1, 1988, the Court resolved the disagreement between the United States and Mississippi as to that portion of the Mississippi coastline at issue in the above-captioned litigation and directed parties to submit to the Special Master a proposed appropriate decree defining the claims of Alabama and Mississippi with respect to Mississippi Sound. On August 17, 1990, the parties agreed on and submitted to the Special Master a proposed decree in accordance with the Court's decision of March 1, 1988, which was approved by the Court on November 5, 1990. Pursuant to that supplemental decree, the baseline (coastline) of the State of Mississippi as well as a portion of the baseline of the State of Alabama was delimited and, by stipulation of the parties, fixed, as described by coordinates in that decree. That portion of the Alabama coastline not described by coordinates in the decree remained ambulatory.

Thereafter, a dispute arose between the State of Alabama and the United States regarding their respective claims under the Submerged Lands Act, 43 U. S. C. § 1301 *et seq.*, to offshore areas in which the baseline had not been fixed by the Court's November 5, 1990, Decree. The parties thereafter filed a joint motion with this Court, requesting that the Court invoke its continuing jurisdiction to supplement the November 5, 1990, Decree. 498 U. S. 9 (1990). With that motion the parties submitted for the Court's consideration a supplemental decree which would fix that portion of the Alabama baseline that had heretofore remained ambulatory, resolve the existing dispute, and avoid future jurisdictional controversies over the State of Alabama Submerged Lands Act grant.

Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The parties' joint motion to supplement the Court's Decree of November 5, 1990, is granted.

2. For the purpose of the Court's Decree herein dated December 12, 1960, 364 U. S. 502 (defining the boundary line between the submerged lands of the States bordering the Gulf of Mexico), the coastline of the States of Alabama and Mississippi shall be determined on the basis that the whole Mississippi Sound constitutes state inland waters;

3. For the purposes of the said Decree of December 12, 1960, the coastline of Alabama includes:

(a) That portion of a straight line from a point on the eastern tip of Petit Bois Island where X = 215985 and Y = 77920 in the Alabama plane coordinate system, west zone, and X = 637152.89 and Y = 198279.25 in the Mississippi plane coordinate system, east zone, to a fixed point previously described as the western tip of Dauphin Island by the Court's Decree of November 5, 1990, where X = 238690 and Y = 84050 in the Alabama plane coordinate system, west zone, and X = 659783.79 and Y = 204674.56 in the Mississippi plane coordinate system, east zone, lying on the Alabama side of the Alabama-Mississippi boundary;

(b) A straight line from the fixed point previously described as the western tip of Dauphin Island where X = 238690 and Y = 84050 in the Alabama plane coordinate system, west zone, to a point on the western tip of Dauphin Island where X = 240239.49 and Y = 85266.90 in the same coordinate system;

(c) The baseline delimiting Dauphin Island determined by the following points in the Alabama plane coordinate system, west zone:

	E. COORD. X	N. COORD. Y
A LINE FROM	240491.79	84972.10
THROUGH	240848.85	84605.82
THROUGH	241013.42	84311.65
THROUGH	241205.05	84118.32
THROUGH	241590.69	84065.03
THROUGH	242142.09	83879.22
THROUGH	242413.48	83796.45
THROUGH	242694.43	83824.75
THROUGH	243220.74	83810.88
THROUGH	243580.37	83798.21
THROUGH	244027.43	83744.51
THROUGH	244536.27	83740.89
THROUGH	244878.06	83687.95
THROUGH	245246.75	83715.64
THROUGH	245641.25	83672.44
THROUGH	245973.56	83518.55
THROUGH	246464.50	83464.57
THROUGH	246886.11	83532.32
THROUGH	247307.57	83579.87
THROUGH	247711.06	83566.93
THROUGH	248158.99	83634.51
THROUGH	248606.77	83681.89

	E. COORD. X	N. COORD. Y
THROUGH	248905.97	83811.13
THROUGH	249204.96	83910.07
THROUGH	249538.75	83968.36
THROUGH	249890.17	84036.63
THROUGH	250276.60	84094.56
THROUGH	250934.57	84090.00
THROUGH	251636.34	84075.04
THROUGH	252313.25	84272.42
THROUGH	252936.89	84379.26
THROUGH	253683.35	84485.27
THROUGH	254464.61	84550.64
THROUGH	255158.29	84636.83
THROUGH	255930.50	84661.89
THROUGH	256527.80	84768.97
THROUGH	257100.01	85058.07
THROUGH	257636.92	85317.12
THROUGH	258244.41	85636.31
THROUGH	258841.55	85723.22
THROUGH	259456.50	85850.44
THROUGH	260045.14	85977.84
THROUGH	260695.58	86165.45
THROUGH	261143.78	86283.70
THROUGH	261758.98	86451.36
THROUGH	262312.84	86629.54
THROUGH	262734.31	86687.37
THROUGH	263076.76	86735.63
THROUGH	263313.48	86713.86
THROUGH	263594.99	86833.24
THROUGH	264034.80	87012.20
THROUGH	264447.62	87090.31
THROUGH	264763.68	87128.65
THROUGH	265255.32	87186.05
THROUGH	265712.59	87354.81
THROUGH	266107.99	87453.26

	E. COORD. X	N. COORD. Y
THROUGH	266626.20	87550.92
THROUGH	267179.63	87668.56
THROUGH	267829.73	87815.89
THROUGH	268532.21	87922.49
THROUGH	269120.58	88019.73
THROUGH	269691.59	88147.40
THROUGH	270166.31	88306.00
THROUGH	270736.80	88352.87
THROUGH	271281.56	88490.83
THROUGH	271843.72	88608.49
THROUGH	272300.62	88726.82
THROUGH	272915.73	88894.67
THROUGH	273600.55	88991.37
THROUGH	274162.58	89088.86
THROUGH	274601.79	89187.13
THROUGH	274953.35	89296.05
THROUGH	275348.70	89394.61
THROUGH	275796.68	89492.83
THROUGH	276227.06	89581.07
THROUGH	276657.61	89699.62
THROUGH	277219.49	89776.96
THROUGH	277763.57	89814.00
THROUGH	278326.00	89982.26
THROUGH	278870.45	90079.93
THROUGH	279397.35	90177.72
THROUGH	280073.43	90284.70
THROUGH	280530.15	90382.93
THROUGH	281179.60	90439.59
THROUGH	281697.41	90486.95
THROUGH	282180.19	90544.63
THROUGH	282829.76	90621.52
THROUGH	283435.09	90638.07
THROUGH	284014.48	90715.40
THROUGH	284698.99	90771.91

	E. COORD. X	N. COORD. Y
THROUGH	285269.60	90849.31
THROUGH	285910.08	90875.79
THROUGH	286568.75	91013.31
THROUGH	287138.94	91020.03
THROUGH	287726.72	91036.75
THROUGH	288393.56	91073.23
THROUGH	288937.49	91090.23
THROUGH	289499.19	91147.55
THROUGH	290086.68	91113.81
THROUGH	290674.16	91080.07
THROUGH	291340.88	91096.39
THROUGH	291946.02	91082.78
THROUGH	292454.92	91110.14
THROUGH	293078.13	91187.37
THROUGH	293674.68	91204.14
THROUGH	294332.04	91119.55
THROUGH	294753.40	91177.75
THROUGH	295306.03	91184.70
THROUGH	296007.66	91170.61
THROUGH	296717.82	91116.07
THROUGH	297498.39	91101.56
THROUGH	298419.12	91055.97
THROUGH	299339.74	90990.20
THROUGH	300171.70	90753.20
THROUGH	300916.74	90658.14
THROUGH	301609.33	90593.70
THROUGH	302275.16	90448.59
THROUGH	302836.46	90435.40
THROUGH	303432.29	90321.01
THROUGH	303913.82	90156.74
THROUGH	304570.40	89920.81
THROUGH	305148.05	89685.31
THROUGH	305664.13	89419.86
THROUGH	306268.49	89254.95

	E. COORD. X	N. COORD. Y
THROUGH	306924.94	88988.76
THROUGH	307634.62	88833.42
THROUGH	308274.89	88819.89
THROUGH	308748.98	88898.18
THROUGH	309476.70	88833.70
THROUGH	310161.04	88860.38
THROUGH	310880.04	88806.08
THROUGH	311616.90	88812.31
THROUGH	312309.75	88788.48
THROUGH	312985.68	88885.98
THROUGH	313459.92	88994.64
THROUGH	314171.36	89172.79
THROUGH	314847.17	89250.12
THROUGH	315672.47	89397.41
THROUGH	316234.25	89475.35
THROUGH	316839.88	89553.08
THROUGH	317515.17	89529.44
THROUGH	318086.23	89708.38
TO	318359.83	90040.37
A LINE FROM	309362.32	80499.88
THROUGH	309370.61	80408.91
THROUGH	309540.79	79407.88
THROUGH	309801.70	78972.10
THROUGH	310106.82	78596.70
THROUGH	310446.88	78190.81
THROUGH	310769.82	77865.84
THROUGH	311163.33	77611.21
THROUGH	311591.47	77265.49
THROUGH	312045.73	76879.23
THROUGH	312526.96	76614.06
THROUGH	312920.66	76389.76
THROUGH	313348.99	76074.36
THROUGH	313707.54	75840.15
THROUGH	314162.68	75615.55

	E. COORD. X	N. COORD. Y
THROUGH	314485.89	75331.01
THROUGH	314809.52	75127.30
THROUGH	315220.95	74933.24
THROUGH	315449.46	75002.79
TO	315572.98	75133.48
A LINE FROM	316237.86	74736.09
THROUGH	316429.31	74421.94
THROUGH	316761.32	74137.39
THROUGH	317252.83	74155.09
THROUGH	317805.05	74031.07
THROUGH	318216.92	73917.86
THROUGH	318681.85	73885.21
TO	318858.57	74126.77
A LINE FROM	319734.51	73809.20
THROUGH	320172.46	73645.37
THROUGH	320408.54	73472.46
THROUGH	320793.59	73258.39
THROUGH	321144.45	73226.34
TO	321276.78	73367.11
A LINE FROM	324818.43	70814.04
THROUGH	324993.50	70722.27
TO	325117.15	70883.31
A LINE FROM	333064.90	81503.36
THROUGH	333168.82	81209.91
THROUGH	333378.02	80915.98
THROUGH	333719.43	80752.77
THROUGH	334061.32	80690.57
THROUGH	334420.93	80668.71
THROUGH	334780.79	80697.36
THROUGH	335324.74	80694.87
THROUGH	335772.51	80763.53
THROUGH	336194.09	80862.63

	E. COORD. X	N. COORD. Y
THROUGH	336896.51	80980.66
THROUGH	337327.09	81130.25
THROUGH	337696.35	81300.31
THROUGH	338047.46	81339.14
THROUGH	338539.04	81397.54
THROUGH	339083.93	81607.24
THROUGH	339549.41	81716.29
THROUGH	339935.70	81775.18
THROUGH	340348.53	81884.47
THROUGH	340752.50	81973.59
THROUGH	341217.96	82082.66
THROUGH	341613.15	82171.83
THROUGH	342087.16	82230.36
THROUGH	342526.61	82410.27
THROUGH	342992.15	82539.57
THROUGH	343554.02	82628.03
THROUGH	344124.44	82665.97
THROUGH	344633.62	82744.58
THROUGH	345090.33	82863.83
THROUGH	345608.10	82902.01
THROUGH	346011.57	82880.08
THROUGH	346477.09	83009.42
THROUGH	347117.85	83087.50
THROUGH	347715.13	83256.70
THROUGH	348180.05	83244.63
THROUGH	348759.47	83343.21
THROUGH	349479.14	83410.91
THROUGH	349953.03	83449.33
THROUGH	350514.82	83527.81
THROUGH	351102.43	83484.96
THROUGH	351672.90	83543.21
THROUGH	352155.65	83601.84
THROUGH	352726.25	83690.42
THROUGH	353331.77	83738.45

	E. COORD. X	N. COORD. Y
THROUGH	353946.10	83796.56
THROUGH	354516.48	83834.66
THROUGH	355069.16	83832.42
THROUGH	355771.25	83900.31
THROUGH	356288.91	83918.44
THROUGH	356806.58	83936.58
THROUGH	357359.37	83964.69
THROUGH	357736.51	83942.99
THROUGH	358245.00	83860.16
THROUGH	358771.24	83827.79
THROUGH	359323.76	83785.21
THROUGH	360034.18	83742.03
THROUGH	360569.58	83810.66
THROUGH	361341.53	83797.57
THROUGH	362166.47	83875.22
THROUGH	362885.71	83842.16
THROUGH	363675.39	83879.57
THROUGH	364131.80	83938.45
THROUGH	364509.47	84058.25
THROUGH	364922.01	84117.31
THROUGH	365369.37	84105.53
THROUGH	365939.40	84052.89
THROUGH	366456.94	84040.86
THROUGH	367044.73	84048.78
THROUGH	367588.41	83986.16
THROUGH	368141.19	84014.43
THROUGH	368606.17	84022.83
THROUGH	369237.28	83879.10
THROUGH	369728.32	83816.71
THROUGH	370034.56	83593.35
THROUGH	370420.34	83531.35
THROUGH	370885.00	83448.86
THROUGH	371446.45	83446.85
THROUGH	371999.16	83454.98

	E. COORD. X	N. COORD. Y
THROUGH	372481.55	83422.96
THROUGH	372972.64	83370.71
THROUGH	373630.59	83368.39
THROUGH	374130.53	83336.33
THROUGH	374534.11	83345.02
THROUGH	375069.34	83373.46
THROUGH	375692.20	83371.30
THROUGH	376314.99	83348.95
THROUGH	376999.09	83296.09
THROUGH	377595.43	83233.44
THROUGH	378306.08	83251.23
THROUGH	378762.13	83209.28
THROUGH	379288.29	83146.90
THROUGH	379919.72	83084.17
THROUGH	380604.06	83102.10
THROUGH	381261.98	83089.82
THROUGH	381919.70	83016.94
THROUGH	382638.87	82953.97
THROUGH	383288.02	82941.75
THROUGH	383910.69	82879.13
THROUGH	384480.86	82857.08
THROUGH	385129.91	82814.60
THROUGH	385840.54	82822.43
THROUGH	386393.38	82871.19
THROUGH	386998.58	82828.88
THROUGH	387621.32	82786.52
THROUGH	388147.40	82693.96
THROUGH	388629.75	82641.95
THROUGH	389191.09	82599.81
THROUGH	389708.53	82547.71
THROUGH	390182.42	82596.77
THROUGH	390901.73	82574.37
THROUGH	391393.04	82582.99
THROUGH	391954.59	82611.60

	E. COORD. X	N. COORD. Y
THROUGH	392533.59	82609.86
THROUGH	393059.69	82517.38
THROUGH	393550.70	82425.00
THROUGH	394094.65	82433.50
THROUGH	394726.24	82411.44
THROUGH	395217.46	82389.80
THROUGH	395629.90	82429.01
THROUGH	396077.20	82387.30
THROUGH	396349.16	82386.52
THROUGH	396744.02	82415.69
THROUGH	397173.87	82404.35
THROUGH	397516.09	82433.68
THROUGH	398016.32	82492.87
THROUGH	398446.30	82532.06
THROUGH	398893.83	82571.21
THROUGH	399472.64	82498.87
THROUGH	399955.51	82628.85
THROUGH	400394.60	82789.26
THROUGH	400448.04	83082.07
THROUGH	400930.74	83151.45
THROUGH	401264.13	83160.63
THROUGH	401737.85	83159.33
THROUGH	402027.37	83168.64
THROUGH	402299.46	83218.41
THROUGH	402711.92	83267.80
THROUGH	403133.25	83357.58
THROUGH	403501.78	83386.90
THROUGH	403984.25	83375.50
THROUGH	404291.45	83435.30
THROUGH	404695.09	83474.63
THROUGH	405081.54	83645.34
THROUGH	405423.99	83765.66
THROUGH	405801.76	83976.81
THROUGH	406144.39	84167.85

	E. COORD. X	N. COORD. Y
THROUGH	406530.27	84126.44
THROUGH	406924.90	84074.90
THROUGH	407372.42	84124.26
THROUGH	407811.04	84123.13
THROUGH	408258.70	84223.00
THROUGH	408837.85	84292.24
THROUGH	409522.28	84361.22
THROUGH	409934.81	84451.11
THROUGH	410470.17	84550.79
THROUGH	410996.78	84660.60
THROUGH	411637.61	84840.85
THROUGH	412418.71	84990.47
THROUGH	413068.07	85079.81
THROUGH	413586.09	85270.50
THROUGH	414183.03	85450.90
THROUGH	414849.99	85570.54
THROUGH	415657.42	85740.36
THROUGH	416491.02	85849.54
THROUGH	417324.66	85978.93
THROUGH	418000.45	86128.91
THROUGH	418798.97	86248.32
THROUGH	419597.59	86418.26
THROUGH	420141.58	86477.66
THROUGH	421115.65	86657.34
THROUGH	421861.76	86888.05
THROUGH	422712.94	87037.74
THROUGH	423397.41	87167.60
THROUGH	423967.70	87227.00
THROUGH	424573.05	87276.23
THROUGH	424836.41	87376.70
THROUGH	425003.05	87366.25
THROUGH	425652.12	87354.80
THROUGH	426275.28	87535.35
THROUGH	426696.34	87544.59

	E. COORD. X	N. COORD. Y
THROUGH	427108.82	87654.87
THROUGH	427617.80	87764.96
THROUGH	427889.90	87855.33
THROUGH	428232.02	87874.85
THROUGH	428609.22	87884.20
THROUGH	428986.33	87853.14
THROUGH	429425.10	87953.30
THROUGH	429933.91	87982.61
THROUGH	430293.61	88022.32
THROUGH	430653.32	88062.03
THROUGH	431057.06	88192.57
THROUGH	431486.95	88242.26
THROUGH	431934.31	88251.51
THROUGH	432329.06	88270.97
THROUGH	432750.24	88350.99
THROUGH	433294.10	88370.18
THROUGH	433759.13	88450.14
THROUGH	434180.17	88459.47
THROUGH	434469.79	88549.85
THROUGH	434882.19	88629.92
THROUGH	435329.59	88669.52
THROUGH	435768.30	88749.55
THROUGH	436119.30	88829.73
THROUGH	436487.85	88920.00
THROUGH	436891.52	89030.41
THROUGH	437312.61	89070.08
THROUGH	437751.30	89150.13
THROUGH	438128.62	89240.39
THROUGH	438602.47	89360.80
THROUGH	439006.13	89471.24
THROUGH	439471.18	89581.57
THROUGH	439865.91	89601.11
THROUGH	440208.02	89620.74
THROUGH	440532.73	89731.32

	E. COORD. X	N. COORD. Y
THROUGH	440866.22	89852.00
THROUGH	441190.85	89912.07
THROUGH	441559.38	90002.39
THROUGH	441919.07	90052.31
THROUGH	442348.83	90041.52
THROUGH	442787.44	90081.23
THROUGH	443024.36	90151.56
THROUGH	443357.69	90171.24
THROUGH	443691.00	90180.82
THROUGH	444112.06	90220.57
THROUGH	444550.67	90260.29
THROUGH	445006.90	90350.51
THROUGH	445375.32	90380.25
THROUGH	445708.79	90500.97
THROUGH	446147.42	90560.92
THROUGH	446506.95	90509.87
THROUGH	446884.06	90489.11
THROUGH	447164.82	90549.31
THROUGH	447375.35	90569.20
THROUGH	447813.96	90619.07
THROUGH	448331.42	90608.22
THROUGH	448857.71	90637.77
THROUGH	449278.79	90697.79
THROUGH	449734.96	90757.76
THROUGH	450182.35	90817.74
THROUGH	450866.72	90998.63
THROUGH	451454.54	91139.26
THROUGH	452112.64	91360.62
THROUGH	452630.45	91622.58
THROUGH	453095.47	91763.39
THROUGH	453551.80	91964.84
THROUGH	454078.26	92145.99
THROUGH	454683.58	92276.55
THROUGH	455209.95	92397.11

	E. COORD.	N. COORD.
	X	Y
THROUGH	455710.07	92568.22
THROUGH	456096.04	92628.36
THROUGH	456534.65	92708.64
THROUGH	456990.81	92799.01
THROUGH	457385.59	92899.55
THROUGH	457885.64	93020.19
THROUGH	458280.44	93140.95
THROUGH	458675.19	93221.31
THROUGH	458955.89	93271.49
THROUGH	459271.79	93422.66
THROUGH	459675.36	93553.53
THROUGH	460149.07	93674.22
THROUGH	460596.54	93855.56
THROUGH	461070.28	93996.47
THROUGH	461421.21	94127.42
THROUGH	461912.46	94248.11
THROUGH	462377.40	94378.95
THROUGH	462772.12	94449.25
THROUGH	463079.18	94570.15
THROUGH	463210.60	94438.69
THROUGH	463570.26	94539.35
THROUGH	464087.77	94629.74
THROUGH	464631.61	94740.32
THROUGH	465079.00	94881.31
THROUGH	465570.28	95062.67
THROUGH	466131.66	95193.46
THROUGH	466596.60	95354.65
THROUGH	467061.55	95525.95
THROUGH	467552.76	95646.73
THROUGH	468158.10	95918.94
THROUGH	468798.42	96090.10
THROUGH	469307.24	96322.01
THROUGH	469780.91	96463.03
THROUGH	470193.23	96664.72

	E. COORD. X	N. COORD. Y
THROUGH	470772.13	96815.78
THROUGH	471245.77	96946.72
THROUGH	471833.42	97087.68
THROUGH	472368.41	97178.18
THROUGH	472903.44	97319.20
THROUGH	473263.04	97409.84
THROUGH	473850.70	97591.24
THROUGH	474473.39	97712.02
THROUGH	474911.95	97873.34
THROUGH	475447.00	98075.00
THROUGH	475894.29	98185.82
THROUGH	476402.97	98316.81
THROUGH	476920.39	98397.28
THROUGH	477393.97	98498.00
THROUGH	477806.18	98629.07
THROUGH	478428.87	98790.32
THROUGH	478946.30	98921.33
THROUGH	479411.09	99001.88
THROUGH	479919.72	99082.41
THROUGH	480366.90	99041.75
THROUGH	480893.00	99001.06
THROUGH	481199.70	98606.93
THROUGH	481322.14	97990.65
THROUGH	481479.95	97929.96
THROUGH	481970.97	97838.79
THROUGH	482269.23	98070.98
THROUGH	482400.89	98333.57
THROUGH	482646.54	98585.99
THROUGH	482909.74	98868.72
THROUGH	483111.46	98959.54
THROUGH	483435.89	98918.98
THROUGH	483953.36	99191.50
THROUGH	484391.89	99403.44
THROUGH	485058.36	99544.58

	E. COORD.	N. COORD.
	X	Y
THROUGH	485488.00	99504.00
THROUGH	485716.07	99705.94
THROUGH	486058.04	99715.91
THROUGH	486408.84	99867.30
THROUGH	486908.66	99917.63
THROUGH	487320.85	100109.42
THROUGH	487820.68	100200.16
THROUGH	488469.63	100452.49
THROUGH	488934.38	100543.26
THROUGH	489407.93	100775.46
THROUGH	489898.99	100906.64
THROUGH	490293.63	101159.08
THROUGH	491003.88	101249.81
THROUGH	491547.53	101370.90
THROUGH	492029.80	101481.91
THROUGH	492617.29	101613.11
THROUGH	493160.94	101734.22
THROUGH	493748.41	101825.03
TO	494142.98	101915.88.

4. The baseline described in Paragraph 3 above shall be fixed as of the date of this decree for the purposes of determining the Submerged Lands Act grant to the State of Alabama and shall from that date no longer be ambulatory.

5. The parties shall bear their own costs of these proceedings.

6. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

GROWE, SECRETARY OF STATE OF MINNESOTA, ET AL. *v.* EMISON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 91–1420. Argued November 2, 1992—Decided February 23, 1993

Shortly after a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other election officials, appellee voters filed a similar action against essentially the same officials in the Federal District Court. Both suits alleged that, in light of the 1990 census results, the State's congressional and legislative districts were malapportioned, in violation of the Federal and State Constitutions; the federal suit contained the additional claim that the current districts diluted the vote of minority groups in Minneapolis, in violation of § 2 of the Voting Rights Act of 1965. Both suits sought declaration that the current districts were unlawful, and judicial construction of new districts if the state legislature failed to act. After the state legislature adopted a new legislative districting plan, which contained numerous drafting errors, a second federal action was filed raising constitutional challenges to the new legislative districts; the two federal suits were consolidated. The District Court set a deadline for the legislature to act on redistricting plans, but refused to abstain or defer to the state-court proceedings. The state court, having found the new legislative districts defective because of the drafting errors, issued a preliminary legislative redistricting plan correcting most of those errors, to be held in abeyance pending further action by the legislature. Before the state court could take additional action, the District Court stayed the state-court proceedings; this Court vacated that stay. When the Governor vetoed the legislature's effort to correct the defective legislative redistricting plan, and to adopt new congressional districts, the state court issued a final order adopting its legislative plan, and held hearings on the congressional plans submitted by the parties. Before the state court could issue a congressional plan, however, the District Court adopted its own redistricting plans, both legislative and congressional, and permanently enjoined interference with state implementation of those plans. The District Court found, in effect, that the state court's legislative plan violated the Voting Rights Act because it did not contain a "super-majority minority" Senate district; its own plan contained such a district, designed to create a majority composed of at least three separately identifiable minority groups.

Syllabus

Held:

1. The District Court erred in not deferring to the state court's timely efforts to redraw the legislative and congressional districts. States have the primary duty and responsibility to perform that task, and federal courts must defer their action when a State, through its legislative *or* judicial branch, has begun in timely fashion to address the issue. *Scott* v. *Germano,* 381 U. S. 407. Absent evidence that these branches cannot timely perform their duty, a federal court cannot affirmatively obstruct, or permit federal litigation to impede, state reapportionment. Judged by these principles, the District Court erred in several respects: It set a deadline for reapportionment directed only to the state legislature, instead of to the legislature and courts; it issued an injunction that treated the state court's provisional legislative plan as "interfering" in the reapportionment process; it failed to give the state court's final order adopting a legislative plan *legal effect* under the principles of federalism and comity embodied in the full faith and credit statute; and it actively prevented the state court from issuing its own congressional plan, although it appears that the state court was prepared to do so. Pp. 32–37.

2. The District Court erred in its conclusion that the state court's legislative plan violated §2 of the Voting Rights Act. The three prerequisites that were identified in *Thornburg* v. *Gingles,* 478 U. S. 30, as necessary to establish a vote-dilution claim with respect to a multimember districting plan—a minority group that is sufficiently large and geographically compact to constitute a majority in a single-member district, minority political cohesion, and majority bloc voting that enables defeat of the minority's preferred candidate—are also necessary to establish a vote-fragmentation claim with respect to a single-member district. In the present case, even making the dubious assumption that the minority voters were geographically compact, the record contains no statistical or anecdotal evidence of majority bloc voting or minority political cohesion among the distinct ethnic and language minority groups the District Court combined in the new district. The *Gingles* preconditions were not only ignored but were on this record unattainable. Pp. 37–42.

782 F. Supp. 427, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

John R. Tunheim, Chief Deputy Attorney General of Minnesota, argued the cause for appellants. With him on the briefs were *Hubert H. Humphrey III,* Attorney General, *Jocelyn F. Olson,* Assistant Attorney General, *John D. French, Michael L. Cheever, Peter S. Wattson,* and *Alan W. Weinblatt.*

Solicitor General Starr argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Dunne, Deputy Solicitor General Roberts, Acting Deputy Assistant Attorney General Simon,* and *Jessica Dunsay Silver.*

Bruce D. Willis argued the cause for appellees. With him on the brief was *Mark B. Peterson.**

JUSTICE SCALIA delivered the opinion of the Court.

This case raises important issues regarding the propriety of the District Court's pursuing reapportionment of Minnesota's state legislative and federal congressional districts in the face of Minnesota state-court litigation seeking similar relief, and regarding the District Court's conclusion that the state court's legislative plan violated § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973.

I

In January 1991, a group of Minnesota voters filed a state-court action against the Minnesota Secretary of State and other officials responsible for administering elections, claiming that the State's congressional and legislative districts were malapportioned, in violation of the Fourteenth Amendment of the Federal Constitution and Article 4, § 2, of the Minnesota Constitution. *Cotlow* v. *Growe,* No. C8–91–985. The plaintiffs asserted that the 1990 federal census results revealed a significant change in the distribution of the state population, and requested that the court declare the current districts unlawful and draw new districts if the legislature failed to do so. In February, the parties stipulated that, in light of the new census, the challenged districting plans were unconstitutional. The Minnesota Supreme Court appointed a Special Redistricting Panel (composed of one appellate judge and two district judges) to preside over the case.

**Robert B. Wallace* and *Jeffrey M. Wice* filed a brief for Congressman Martin Frost et al. as *amici curiae* urging reversal.

In March, a second group of plaintiffs filed an action in federal court against essentially the same defendants, raising similar challenges to the congressional and legislative districts. *Emison* v. *Growe*, Civ. No. 4–91–202. The *Emison* plaintiffs (who include members of various racial minorities) in addition raised objections to the legislative districts under §2 of the Voting Rights Act, 42 U. S. C. §1973, alleging that those districts needlessly fragmented two Indian reservations and divided the minority population of Minneapolis. The suit sought declaratory relief and continuing federal jurisdiction over any legislative efforts to develop new districts. A three-judge panel was appointed pursuant to 28 U. S. C. §2284(a).

While the federal and state actions were getting underway, the Minnesota Legislature was holding public hearings on, and designing, new legislative districts. In May, it adopted a new legislative districting plan, Chapter 246, Minn. Stat. §§2.403–2.703 (Supp. 1991), and repealed the prior 1983 apportionment. It was soon recognized that Chapter 246 contained many technical errors—mistaken compass directions, incorrect street names, noncontiguous districts, and a few instances of double representation. By August, committees of the legislature had prepared curative legislation, Senate File 1596 and House File 1726 (collectively, Senate File 1596), but the legislature, which had adjourned in late May, was not due to reconvene until January 6, 1992.

Later in August, another group of plaintiffs filed a second action in federal court, again against the Minnesota Secretary of State. *Benson* v. *Growe*, No. 4–91–603. The *Benson* plaintiffs, who include the Republican minority leaders of the Minnesota Senate and House, raised federal and state constitutional challenges to Chapter 246, but no Voting

Rights Act allegations. The *Benson* action was consolidated with the *Emison* suit; the *Cotlow* plaintiffs, as well as the Minnesota House of Representatives and State Senate, intervened.

With the legislature out of session, the committees' proposed curative measures for Chapter 246 pending, and the state court in *Cotlow* considering many of the same issues, the District Court granted the defendants' motion to defer further proceedings pending action by the Minnesota Legislature. It denied, however, defendants' motion to abstain in light of the *Cotlow* suit, or to allow the state court first to review any legislative action or, if the legislature failed to act, to allow the state court first to issue a court-ordered redistricting plan. The District Court set a January 20, 1992, deadline for the state legislature's action on both redistricting plans, and appointed special masters to develop contingent plans in the event the legislature failed to correct Chapter 246 or to reapportion Minnesota's eight congressional districts.

Meanwhile, the *Cotlow* panel concluded (in October) that Chapter 246, applied as written (*i. e.*, with its drafting errors), violated both the State and Federal Constitutions, and invited the parties to submit alternative legislative plans based on Chapter 246. It also directed the parties to submit by mid-October written arguments on any Chapter 246 violations of the Voting Rights Act. In late November, the state court issued an order containing its preliminary legislative redistricting plan—essentially Chapter 246 with the technical corrections (though not the stylistic corrections) contained in Senate File 1596. (Since no party had responded to its order concerning Voting Rights Act violations, the court concluded that Chapter 246 did not run afoul of that Act.) It proposed putting its plan into effect on January 21, 1992, if the legislature had not acted by then. Two weeks later, after further argument, the *Cotlow* panel indicated it would release a revised and final version of its legislative redistricting plan in a few days.

In early December, before the state court issued its final plan, the District Court stayed all proceedings in the *Cotlow* case, and enjoined parties to that action from "attempting to enforce or implement any order of the . . . Minnesota Special Redistricting Panel which has proposed adoption of a reapportionment plan relating to state redistricting or Congressional redistricting." App. to Juris. Statement 154. The court explained its action as necessary to prevent the state court from interfering with the legislature's efforts to redistrict and with the District Court's jurisdiction. It mentioned the *Emison* Voting Rights Act allegations as grounds for issuing the injunction, which it found necessary in aid of its jurisdiction, see 28 U. S. C. § 1651. One judge dissented.

Four days later the state court issued an order containing its final legislative plan, subject to the District Court's injunction and still conditioned on the legislature's failure to adopt a lawful plan. The same order provided, again subject to the District Court's injunction, that congressional redistricting plans be submitted by mid-January. The obstacle of the District Court injunction was removed on January 10, 1992, when, upon application of the *Cotlow* plaintiffs, we vacated the injunction. 502 U. S. 1022.

When the legislature reconvened in January, both Houses approved the corrections to Chapter 246 contained in Senate File 1596 and also adopted a congressional redistricting plan that legislative committees had drafted the previous October. The Governor, however, vetoed the legislation. On January 30, the state court issued a final order adopting its legislative plan and requiring that plan to be used for the 1992 primary and general elections. By February 6, pursuant to an order issued shortly after this Court vacated the injunction, the parties had submitted their proposals for congressional redistricting, and on February 17 the state court held hearings on the competing plans.

Two days later, the District Court issued an order adopting its own legislative and congressional districting plans and permanently enjoining interference with state implementation of those plans. 782 F. Supp. 427, 448–449 (Minn. 1992). The *Emison* panel found that the state court's modified version of Chapter 246 "fails to provide the equitable relief necessary to cure the violation of the Voting Rights Act," *id.*, at 440, which in its view required at least one "super-majority minority" Senate district, a district in which the minority constitutes a clear majority. The District Court rejected Chapter 246 as a basis for its plan, and instead referred to state policy as expressed in the Minnesota Constitution and in a resolution adopted by both Houses of the legislature. See Minn. Const., Art. 4, § 2; H. R. Con. Res. No. 2, 77th Leg., Reg. Sess. (1991). Judge MacLaughlin dissented in part. The District Court was unanimous, however, in its adoption of a congressional redistricting plan, after concluding that the pre-existing 1982 plan violated Art. I, § 2, of the Federal Constitution. Although it had received the same proposed plans submitted to the state court earlier that month, it used instead a congressional plan prepared by its special masters. Finally, the District Court retained jurisdiction to ensure adoption of its reapportionment plans and to enforce the permanent injunction.

In early March, the state court indicated that it was "fully prepared to release a congressional plan" but that the federal injunction prevented it from doing so. In its view, the federal plan reached population equality "without sufficient regard for the preservation of municipal and county boundaries." App. to Juris. Statement 445–446.

Appellants sought a stay of the District Court's February order pending this appeal. JUSTICE BLACKMUN granted the stay with respect to the legislative redistricting plan. No. 91–1420 (Mar. 11, 1992) (in chambers). We noted probable jurisdiction. 503 U. S. 958 (1992).

II

In their challenge to both of the District Court's redistricting plans, appellants contend that, under the principles of *Scott* v. *Germano*, 381 U. S. 407 (1965) *(per curiam)*, the court erred in not deferring to the Minnesota Special Redistricting Panel's proceedings. We agree.

The parties do not dispute that both courts had jurisdiction to consider the complaints before them. Of course federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abstain (*i. e.*, dismiss the case before it) nor defer to the state proceedings (*i. e.*, withhold action until the state proceedings have concluded). See *McClellan* v. *Carland*, 217 U. S. 268, 282 (1910). In rare circumstances, however, principles of federalism and comity dictate otherwise. We have found abstention necessary, for example, when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain ongoing state criminal proceedings. See *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 814–817 (1976) (collecting examples). We have required deferral, causing a federal court to "sta[y] its hands," when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496, 501 (1941).[1]

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[1] We have referred to the *Pullman* doctrine as a form of "abstention," see 312 U. S., at 501–502. To bring out more clearly, however, the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits, it would be preferable to speak of *Pullman* "deferral." *Pullman* deferral recognizes that federal courts should not prematurely resolve the constitutionality of a state statute, just as *Germano* deferral recognizes that federal courts should not prematurely involve themselves in redistricting.

In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself. In *Germano,* a Federal District Court invalidated Illinois' Senate districts and entered an order requiring the State to submit to the court any revised Senate districting scheme it might adopt. An action had previously been filed in state court attacking the same districting scheme. In that case the Illinois Supreme Court held (subsequent to the federal court's order) that the Senate districting scheme was invalid, but expressed confidence that the General Assembly would enact a lawful plan during its then current session, scheduled to end in July 1965. The Illinois Supreme Court retained jurisdiction to ensure that the upcoming 1966 general elections would be conducted pursuant to a constitutionally valid plan.

This Court disapproved the District Court's action. The District Court "should have stayed its hand," we said, and in failing to do so overlooked this Court's teaching that state courts have a significant role in redistricting. 381 U. S., at 409.

> "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.
>
> ". . . The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election . . . ." *Ibid.* (citations omitted).

Today we renew our adherence to the principles expressed in *Germano*, which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. See U. S. Const., Art. I, § 2. "We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman* v. *Meier*, 420 U. S. 1, 27 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.

Judged by these principles, the District Court's December injunction of state-court proceedings, vacated by this Court in January, was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state *judicial* redistricting. And the injunction itself treated the state court's provisional legislative redistricting plan as "interfering" in the reapportionment process. But the doctrine of *Germano* prefers *both* state branches to federal courts as agents of apportionment. The Minnesota Special Redistricting Panel's issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable "interference," was precisely the sort of state judicial supervision of redistricting we have encouraged. See *Germano*, 381 U. S., at 409 (citing cases).

Nor do the reasons offered by the District Court for its actions in December and February support departure from the *Germano* principles. It is true that the *Emison* plaintiffs alleged that the 1983 legislative districting scheme violated the Voting Rights Act, while the *Cotlow* complaint never invoked that statute. *Germano,* however, does not require that the federal and state-court complaints be identical; it instead focuses on the nature of the relief requested: reapportionment of election districts. Minnesota can have only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer.

The District Court also expressed concern over the lack of time for orderly appeal, prior to the State's primaries, of any judgment that might issue from the state court, noting that Minnesota allows the losing party 90 days to appeal. See Minn. Rule Civ. App. Proc. 104.01. We fail to see the relevance of the speed of appellate review. *Germano* requires only that the state agencies adopt a constitutional plan "within ample time . . . to be utilized in the [upcoming] election," 381 U. S., at 409. It does not require appellate review of the plan prior to the election, and such a requirement would ignore the reality that States must often redistrict in the most exigent circumstances—during the brief interval between completion of the decennial federal census and the primary season for the general elections in the next even-numbered year. Our consideration of this appeal, long after the Minnesota primary and final elections have been held, itself reflects the improbability of completing judicial review before the necessary deadline for a new redistricting scheme.

It may be useful to describe what ought to have happened with respect to each redistricting plan. The state court entered its judgment adopting its modified version of Chapter 246 in late January (nearly three weeks before the federal court issued its opinion). That final order, by declaring the legislature's version of Chapter 246 unconstitutional and adopting a legislative plan to replace it, altered the status quo: The state court's plan became the law of Minnesota. At the very least, the elementary principles of federalism and comity embodied in the full faith and credit statute, 28

U. S. C. § 1738, obligated the federal court to give that judgment *legal effect,* rather than treating it as simply one of several competing legislative redistricting proposals available for the District Court's choosing. See *Atlantic Coast Line R. Co.* v. *Locomotive Engineers,* 398 U. S. 281, 286, 296 (1970). In other words, after January 30 the federal court was empowered to entertain the *Emison* plaintiffs' claims relating to legislative redistricting only to the extent those claims challenged the *state court's* plan. Cf. *Wise* v. *Lipscomb,* 437 U. S. 535, 540 (1978) (opinion of WHITE, J.).

With respect to the congressional plan, the District Court did not ignore any state-court judgment, but only because it had actively prevented such a judgment from issuing. The wrongfully entered December injunction prevented the Special Redistricting Panel from developing a contingent plan for congressional redistricting, as it had for legislative redistricting prior to the injunction. The state court's December order to the parties for mid-January submission of congressional plans was rendered a nullity by the injunction, which was not vacated until January 10. The net effect was a delay of at least a few weeks in the submissions to the state court, and in hearings on those submissions. A court may not acknowledge *Germano* in one breath and impede a state court's timely development of a plan in the next. It would have been appropriate for the District Court to establish a deadline by which, if the Special Redistricting Panel had not acted, the federal court would proceed. But the January 20 deadline that the District Court established here was explicitly directed *solely at the legislature.* The state court was never given a time by which it should decide on reapportionment, legislative *or* congressional, if it wished to avoid federal intervention.

Of course the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, would not develop a redistricting plan in time for the primaries.

Germano requires deferral, not abstention. But in this case, in addition to the fact that the federal court itself had been (through its injunction) a cause of the state court's delay, it nonetheless appeared that the state court was fully prepared to adopt a congressional plan in as timely a manner as the District Court. The Special Redistricting Panel received the same plans submitted to the federal court, and held hearings on those plans two days before the federal court issued its opinion. The record simply does not support a conclusion that the state court was either unwilling or unable to adopt a congressional plan in time for the elections.[2] What occurred here was not a last-minute federal-court rescue of the Minnesota electoral process, but a race to beat the Minnesota Special Redistricting Panel to the finish line. That would have been wrong, even if the Panel had not been tripped earlier in the course. The District Court erred in not deferring to the state court's timely consideration of congressional reapportionment.

III

The District Court concluded that there was sufficient evidence to prove minority vote dilution in a portion of the city of Minneapolis, in violation of § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973.[3] 782 F. Supp., at 439. Choosing not

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[2] Although under Minnesota law legislative districts must be drawn before precinct boundaries can be established, see Minn. Stat. § 204B.14, subd. 3 (Supp. 1991), congressional districts were not needed in advance of the March 3 precinct caucuses. Congressional district conventions did not take place until late April and early May.

[3] That section provides:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

"(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes to apply the preconditions for a vote-dilution violation set out by this Court for challenges to multimember districts, see *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), the court instead proceeded directly to the "totality of circumstances" test in § 2(b) and found unlawful dilution. It rejected, as a basis for its redistricting plan, Chapter 246, Chapter 246 as modified by Senate File 1596, and the state court's version of Chapter 246, and adopted instead its special masters' legislative plan, which includes a Senate district stretching from south Minneapolis, around the downtown area, and then into the northern part of the city in order to link minority populations. This oddly shaped creation, Senate District 59, is 43 percent black and 60 percent minority, including at least three separately identifiable minority groups.[4] In the District Court's view, based on "[j]udicial experience, as well as the results of past elections," a super-majority minority Senate district in Minneapolis was required in order for a districting scheme to comply with the Voting Rights Act.

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leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

[4] These percentages refer to total population. To establish whether a § 2 violation has occurred (which presumably requires application of the same standard that measures whether a § 2 violation has been remedied) other courts have looked to, not the district's total minority population, but the district's minority population *of voting age*. See, *e. g.*, *Romero* v. *Pomona*, 883 F. 2d 1418, 1425–1426, and n. 13 (CA9 1989) (citing cases). *Gingles* itself repeatedly refers to the voting population, see, *e. g.*, 478 U. S., at 48, 50. We have no need to pass upon this aspect of the District Court's opinion.

782 F. Supp., at 440. We must review this analysis because, if it is correct, the District Court was right to deny effect to the state-court legislative redistricting plan.

As an initial matter, it is not clear precisely which legislative districting plan produced the vote dilution that necessitated the super-majority remedy. For almost a decade prior to the 1992 election season, the only legislative districting plan that had been in use in Minnesota was the 1983 plan, which all parties agreed was unconstitutional in light of the 1990 census. More importantly, the state court had *declared* the 1983 plan to be unconstitutional in its final order of January 30. Once that order issued, the *Emison* plaintiffs' claims that the 1983 plan violated the Voting Rights Act became moot, unless those claims also related to the superseding plan. But no party to this litigation has ever alleged that either Chapter 246, or the modified version of Chapter 246 adopted by the state court, resulted in vote dilution. The District Court did not hold a hearing or request written argument from the parties on the §2 validity of any particular plan; nor does the District Court's discussion focus on any particular plan.

Although the legislative plan that in the court's view produced the §2 "dilution" violation is unclear, the District Court did clearly conclude that the state court's plan could not remedy that unspecified violation because it "fail[ed] to provide the affirmative relief necessary to adequately protect minority voting rights." *Id.,* at 448. The District Court was of the view, in other words, as the dissenting judge perceived, see *id.,* at 452, and n. 6 (MacLaughlin, J., concurring in part and dissenting in part), that *any* legislative plan lacking a super-majority minority Senate district in Minneapolis violated §2. We turn to the merits of this position.

Our precedent requires that, to establish a vote-dilution claim with respect to a multimember districting plan (and hence to justify a super-majority districting remedy), a plaintiff must prove three threshold conditions: first, "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles,* 478 U. S., at 50–51. We have not previously considered whether these *Gingles* threshold factors apply to a § 2 dilution challenge to a single-member districting scheme, a so-called "vote fragmentation" claim. See *id.,* at 46–47, n. 12. We have, however, stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts, see, *e. g., id.,* at 47, and n. 13; *id.,* at 87 (O'CONNOR, J., concurring in judgment); *Rogers* v. *Lodge,* 458 U. S. 613, 616–617 (1982); see also *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966)—which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment, see, *e. g., Connor* v. *Finch,* 431 U. S. 407, 415 (1977). It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district. Certainly the reasons for the three *Gingles* prerequisites continue to apply: The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district, see *Gingles, supra,* at 50, n. 17. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population, see *Gingles, supra,* at 51. Unless these points are established, there neither has been a wrong nor can be a remedy.[5]

In the present case, even if we make the dubious assumption that the minority voters were "geographically compact," there was quite obviously a higher-than-usual need for the second of the *Gingles* showings. Assuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential. See *Badillo* v. *Stockton*, 956 F. 2d 884, 891 (CA9 1992); *Concerned Citizens of Hardee County* v. *Hardee County Bd. of Comm'rs*, 906 F. 2d 524 (CA11 1990); *Campos* v. *Baytown*, 840 F. 2d 1240, 1244 (CA5 1988), cert. denied, 492 U. S. 905 (1989). Since a court may not presume bloc voting within even a single minority group, see *Gingles*, *supra*, at 46, it made no sense for the District Court to (in effect) indulge that presumption as to bloc voting within an agglomeration of distinct minority groups.

We are satisfied that in the present case the *Gingles* preconditions were not only ignored but were unattainable. As the District Court acknowledged, the record simply "contains no statistical evidence" of minority political cohesion (whether of one or several minority groups) or of majority bloc voting in Minneapolis. 782 F. Supp., at 436, n. 30. And even anecdotal evidence is lacking. Recognizing this void, the court relied on an article identifying bloc voting as a national phenomenon that is "'all but inevitable.'" *Ibid.*, quoting Howard & Howard, The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm, 83 Colum. L. Rev. 1615, 1625 (1983). A law review article on national voting patterns is no substitute for proof that bloc voting occurred in Minneapolis. Cf. *Gingles*, 478 U. S., at 58–61 (summarizing statistical and anecdotal evidence in that case). Section 2 "does not assume the existence of racial bloc voting; plaintiffs must prove it." *Id.*, at 46.

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[5] *Gingles* expressly declined to resolve whether, when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice. 478 U. S., at 46–47, n. 12. We do not reach that question in the present case either: Although the *Emison* plaintiffs alleged both vote dilution and minimization of vote influence (in the 1983 plan), the District Court considered only the former issue in reviewing the state court's plan.

* * *

The District Court erred in not deferring to the state court's efforts to redraw Minnesota's state legislative and federal congressional districts. Its conclusion that the state court's legislative districting plan (which it treated as merely one available option) violated § 2 of the Voting Rights Act was also erroneous. Having found these defects, we need not consider the other points of error raised by appellants.

The judgment is reversed, and the case is remanded with instructions to dismiss.

So ordered.

FEX *v.* MICHIGAN

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 91–7873. Argued December 8, 1992—Decided February 23, 1993

Indiana and Michigan are parties to the Interstate Agreement on Detainers (IAD), Article III(a) of which provides that a prisoner of one party State who is the subject of a detainer lodged by another such State must be brought to trial within 180 days "after he shall have caused to be delivered" to the prosecuting officer and the appropriate court of the latter State a request for final disposition of the charges on which the detainer is based. Petitioner Fex, a prisoner in Indiana, was brought to trial in Michigan 196 days after he gave such a request to Indiana prison authorities and 177 days after the request was received by the Michigan prosecutor. His pretrial motion pursuant to Article V(c) of the IAD, which provides for dismissal with prejudice if trial does not commence within the 180-day period, was denied on the ground that the statutory period did not begin until the Michigan prosecutor received his request. His conviction was set aside by the Michigan Court of Appeals, which held that the 180-day period was triggered by transmittal of his request to the Indiana officials. The State Supreme Court summarily reversed.

Held: It is self-evident that no one can have "caused something to be delivered" unless delivery in fact occurs. The textual possibility still exists, however, that *once delivery has been made,* the 180 days must be computed from the date the prisoner "caused" that delivery. Although the text of Article III(a) is ambiguous in isolation, commonsense indications and the import of related provisions compel the conclusion that the 180-day period does not commence until the prisoner's disposition request has actually been delivered to the court and prosecutor of the jurisdiction that lodged the detainer against him. Delivery is a more likely choice for triggering the time limit than is causation of delivery because the former concept is more readily identifiable as a point in time. Moreover, if delivery is the trigger, the consequence of a warden's delay in forwarding the prisoner's request will merely be postponement of the starting of the 180-day clock, whereas if causation is the trigger, the consequence will be total preclusion of the prosecution, even before the prosecutor knew it had been requested. Delivery as the critical event is confirmed by the fact that the IAD provides for documentary evidence of the time of receipt (by requiring the request to be sent "by registered or certified mail, return receipt requested," Article III(b)), but nowhere requires a record of when the request is transmitted to the warden (if that is what constitutes the "causation"). Finally, it is unlikely that if transmittal were the critical event the IAD would be so indifferent as to the manner of transmittal. Article III(b) says only that the request "shall be *given or sent*" (emphasis added). Fex's "fairness" and "higher purpose" arguments are more appropriately addressed to the legislatures of the States that have adopted the IAD. Pp. 47-52.

439 Mich. 117, 479 N. W. 2d 625, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 52.

John B. Payne, Jr., by appointment of the Court, 505 U. S. 1202, argued the cause and filed a brief for petitioner.

Jerrold Schrotenboer argued the cause and filed a brief for respondent.

Richard H. Seamon argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller*, and *Deputy Solicitor General Bryson.*

JUSTICE SCALIA delivered the opinion of the Court.

This case arises out of a "detainer," which is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking that the prisoner be held for the agency, or that the agency be advised when the prisoner's release is imminent. Indiana and Michigan, along with 46 other States, the District of Columbia, and the United States, are parties to the Interstate Agreement on Detainers (IAD). See Ind. Code § 35-33-10-4 (1988); Mich. Comp. Laws § 780.601 (1979); Pub. L. 91-538, 84 Stat. 1397-1403, 18 U. S. C. App. § 2; 11 U. L. A. 213-214 (Supp. 1992) (listing jurisdictions). Two provisions of that interstate agreement give rise to the present suit: Article III and Article V(c), which are set forth in the margin.[1]

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[1] Title 18 U. S. C. App. §2 contains the full text of the IAD, and we refer to its provisions by their original article numbers, as set forth there. Article III of the IAD provides in relevant part as follows:

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided,* That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based."

Article V(c) of the IAD provides, in relevant part:

"[I]n the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III . . . hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint

On February 29, 1988, petitioner was charged in Jackson County, Michigan, with armed robbery, possession of a firearm during a felony, and assault with intent to murder. At the time, he was held in connection with unrelated offenses at the Westville Correctional Center in Westville, Indiana. The Jackson County Prosecuting Attorney therefore lodged a detainer against him. On September 7, 1988, the Indiana correctional authorities informed petitioner of the detainer, and he gave them his request for final disposition of the Michigan charges. On September 22, the prison authorities mailed petitioner's request; and on September 26, 1988, the Jackson County Prosecuting Attorney and the Jackson County Circuit Court received it. Petitioner's trial on the Michigan charges began on March 22, 1989, 177 days after his request was delivered to the Michigan officials and 196 days after petitioner gave his request to the Indiana prison authorities. 439 Mich. 117, 118, 479 N. W. 2d 625 (1992) *(per curiam).*

Prior to trial, petitioner moved for dismissal with prejudice pursuant to Article V(c) of the IAD, on the ground that his trial would not begin until after the 180-day time limit set forth in Article III(a). The trial court denied the motion, reasoning that the 180-day time period did not commence until the Michigan prosecutor's office received petitioner's request. App. 36. Petitioner was convicted on all charges except assault with intent to murder, but his conviction was set aside by the Michigan Court of Appeals, which held that "the commencement of the 180-day statutory period was triggered by [petitioner's] request for final disposition to the [Indiana] prison officials." *Id.,* at 39. The Supreme Court of Michigan summarily reversed. 439 Mich. 117, 479 N. W. 2d 625 (1992) *(per curiam).* We granted certiorari. 504 U. S. 908 (1992).

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has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

The outcome of the present case turns upon the meaning of the phrase, in Article III(a), "within one hundred and eighty days after he shall have caused to be delivered." The issue, specifically, is whether, within the factual context before us, that phrase refers to (1) the time at which petitioner transmitted his notice and request (hereinafter simply "request") to the Indiana correctional authorities; or rather (2) the time at which the Michigan prosecutor and court (hereinafter simply "prosecutor") received that request.

Respondent argues that no one can have "caused something to be delivered" unless delivery in fact occurs. That is self-evidently true,[2] and so we must reject petitioner's contention that a prisoner's transmittal of an IAD request to the prison authorities commences the 180-day period even if the request gets lost in the mail and is never delivered to the "receiving" State (*i. e.*, the State lodging the detainer, see Article II(c)). That still leaves open the textual possibility, however, that, *once delivery has been made*, the 180 days must be computed, not from the date of delivery but from the date of transmittal to the prison authorities. That is the only possibility the balance of our discussion will consider; and for convenience we shall refer to it as petitioner's interpretation.

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[2] Not, however, to the dissent: "The fact that the rule for marking the start of the 180-day period is written in a fashion that contemplates actual delivery . . . does not mean that it cannot apply if the request is never delivered." *Post*, at 55. Of course it vastly understates the matter to say that the provision is "written in a fashion that contemplates actual delivery," as one might say Hamlet was written in a fashion that contemplates 16th-century dress. Causation of delivery is the very condition of this provision's operation—and the dissent says it does not matter whether delivery is caused.

The dissent asserts that "the logical way to express the idea that receipt must be perfected before the provision applies would be to start the clock 180 days 'after he has caused the request *to have been delivered.*'" *Post*, at 53. But that reformulation changes the meaning in two respects that have nothing to do with whether receipt must be perfected: First, by using the perfect indicative ("after he has caused") rather than the future perfect ("after he shall have caused"), it omits the notion that the "causing" is to occur not merely before the statutory deadline, but *in the future;* second, by using the perfect infinitive ("to have been delivered") rather than the present ("to be delivered"), it adds the utterly fascinating notion that the receipt is to occur before the causing of receipt. The omission of futurity and the addition of a requirement of antecedence are the only differences between saying, for example, "after he shall have found the hostages to be well treated" and "after he has found the hostages to have been well treated." In both cases good treatment must be established, just as under both the statutory text and the dissent's reformulation delivery must be established.

Respondent places great reliance upon the provision's use of the future perfect tense ("*shall have caused* to be delivered"). It seems to us, however, that the future perfect would be an appropriate tense for both interpretations: The prisoner's transmittal of his request to the warden (if that is the triggering event), or the prosecutor's receipt of the request (if that is the triggering event), is to be completed ("perfected") at some date in the future (viewed from the time of the IAD's adoption) before some other date in the future that is under discussion (expiration of the 180 days). We think it must be acknowledged that the language will literally *bear* either interpretation—*i. e.*, that the crucial point is the prisoner's transmittal of his request, or that it is the prosecutor's receipt of the request. One can almost be induced to accept one interpretation or the other on the basis of which words are emphasized: "shall have *caused* to be delivered" *versus* "shall have caused to be *delivered.*"[3]

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[3] The dissent contends that the phrase "he shall have caused" puts the focus "on the prisoner's act, and that act is complete when he transmits his request to the warden." *Ibid.* It is not evident to us that the act of "causing to be delivered" is complete before delivery. Nor can we agree that, unless it has the purpose of starting the clock running upon transmittal to the warden, the phrase "he shall have caused" is "superfluous." *Ibid.* It sets the stage for the succeeding paragraph, making it clear to the reader that the notice at issue is a notice which (as paragraph (b) will clarify) the prisoner is charged with providing.

Though the text alone is indeterminate, we think resolution of the ambiguity is readily to be found in what might be called the sense of the matter, and in the import of related provisions. As to the former: Petitioner would have us believe that the choice of "triggers" for the 180-day time period lies between, on the one hand, the date the request is received by the prosecutor and, on the other hand, the date the request is delivered to the warden of the prison. In fact, however, while the former option is clearly identified by the textual term "delivered," there is no textual identification of a clear alternative at the other end. If one seeks to determine the moment at which a prisoner "caused" the later delivery of a properly completed request, nothing in law or logic suggests that it must be when he placed the request in the hands of the warden. Perhaps it was when he gave the request to a fellow inmate to deliver to the warden—or even when he *mailed* it to the warden (Article III(b) provides that the request "shall be given *or sent* by the prisoner to the warden" (emphasis added)). It seems unlikely that a legislature would select, for the starting point of a statute of limitations, a concept so indeterminate as "caused." It makes more sense to think that, as respondent contends, delivery is the key concept, and that paragraph (a) includes the notion of causality (rather than referring simply to "delivery" by the prisoner) merely to be more precise, anticipating the requirement of paragraph (b) that delivery be made *by the warden* upon the prisoner's initiation.

Another commonsense indication pointing to the same conclusion is to be found in what might be termed (in current political jargon) the "worst-case scenarios" under the two interpretations of the IAD. Under respondent's interpretation, it is possible that a warden, through negligence or even malice, can delay forwarding of the request and thus postpone the starting of the 180-day clock. At worst, the prisoner (if he has not checked about the matter for half a year) will not learn about the delay until several hundred days have elapsed with no trial. The result is that he will spend several hundred additional days under detainer (which entails certain disabilities, such as disqualification from certain rehabilitative programs, see *United States* v. *Mauro,* 436 U. S. 340, 359 (1978)), and will have his trial delayed several hundred days.[4] That result is bad, given the intent of the IAD. It is, however, no worse than what regularly occurred before the IAD was adopted, and in any event cannot be entirely avoided by embracing petitioner's view that transmittal to the warden is the measuring event. As we have said, the IAD unquestionably requires *delivery,* and only after that has occurred can one entertain the possibility of counting the 180 days from the transmittal to the warden. Thus, the careless or malicious warden, under petitioner's interpretation, may be unable to *delay* commencement of the 180-day period, but can *prevent it entirely,* by simply failing to forward the request. More importantly, however, the worst-case scenario under petitioner's interpretation produces results that are significantly worse: If, through negligence of the warden, a prisoner's IAD request is delivered to the prosecutor more than 180 days after it was transmitted to the warden, the prosecution will be precluded before the prosecutor even knows it has been requested. It is possible, though by no means certain, that this consequence could be avoided by the receiving state court's invocation of the "good-cause continuance" clause of Article III(a)[5]—but it seems to us implausible that such a plainly undesirable result was meant to be avoided only by resort to the (largely discretionary) application of that provision. It is more reasonable to think that the receiving State's prosecutors are in no risk of losing their case until they have been *informed* of the request for trial.

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[4] There is no substance to the dissent's assertion that one of the "reason[s] for the IAD's creation" was to prevent the inmate from being "deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed." *Post,* at 56, 57 (citations and internal quotation marks omitted). Since the IAD does not *require* detainers to be filed, giving a prisoner the opportunity to achieve concurrent sentencing on outstanding offenses is obviously an accidental consequence of the scheme rather than its objective. Moreover, we are unaware of any studies showing that judges willing to impose concurrent sentences are *not* willing (in the same circumstances) to credit out-of-state time. If they are (as they logically should be), the opportunity of obtaining a concurrent sentence would ordinarily have zero value.

Indications in the text of Article III confirm, in our view, that the receiving State's receipt of the request starts the clock. The most significant is the provision of Article III(b) requiring the warden to forward the prisoner's request and accompanying documents "by registered or certified mail, return receipt requested." The IAD thus provides for documentary evidence of the date on which the request is delivered to the officials of the receiving State, but requires no record of the date on which it is transmitted to the warden (assuming that is to be considered the act of "causing"). That would be peculiar if the latter rather than the former were the critical date. Another textual clue, we think, is the IAD's apparent indifference as to the manner of transmittal to the warden: Article III(b) says only that the request "shall be *given or sent* by the prisoner to the warden" (emphasis added). A strange nonchalance, if the giving or sending (either one) is to start the 180 days. Petitioner avoids this difficulty by simply positing that it is the warden's *receipt*, no matter what the manner of giving or sending, that starts the clock—but there is simply no textual basis for that; surely the "causing" which petitioner considers central occurs upon the giving or sending.

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[5] Some courts have held that a continuance must be requested and granted before the 180-day period has expired. See, *e. g., Dennett* v. *State,* 19 Md. App. 376, 381, 311 A. 2d 437, 440 (1973) (citing *Hoss* v. *State,* 266 Md. 136, 143, 292 A. 2d 48, 51 (1972)); *Commonwealth* v. *Fisher,* 451 Pa. 102, 106, 301 A. 2d 605, 607 (1973); *State* v. *Patterson,* 273 S. C. 361, 363, 256 S. E. 2d 417, 418 (1979). But see, *e. g., State* v. *Lippolis,* 107 N. J. Super. 137, 147, 257 A. 2d 705, 711 (App. Div. 1969), rev'd, 55 N. J. 354, 262 A. 2d 203 (1970) *(per curiam)* (reversing on reasoning of dissent in Appellate Division). We express no view on this point.

Petitioner makes the policy argument that "[f]airness requires the burden of compliance with the requirements of the IAD to be placed entirely on the law enforcement officials involved, since the prisoner has little ability to enforce compliance," Brief for Petitioner 8, and that any other approach would "frustrate the higher purpose" of the IAD, leaving "neither a legal nor a practical limit on the length of time prison authorities could delay forwarding a [request]," *id.*, at 20. These arguments, however, assume the availability of a reading that would give effect to a request that is never delivered *at all.* (Otherwise, it remains within the power of the warden to frustrate the IAD by simply not forwarding.) As we have observed, the textual requirement "shall have caused to be delivered" is simply not susceptible of such a reading. Petitioner's "fairness" and "higher purpose" arguments are, in other words, more appropriately addressed to the legislatures of the contracting States, which adopted the IAD's text.

Our discussion has addressed only the second question presented in the petition for writ of certiorari; we have concluded that our grant as to the first question was improvident, and do not reach the issue it presents. We hold that the 180-day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him. The judgment of the Supreme Court of Michigan is affirmed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

I am not persuaded that the language of Article III is ambiguous. The majority suggests that a search for the literal meaning of the contested phrase comes down to an unresolvable contest between a reading that emphasizes the word "caused" and one that emphasizes the word "delivered." But Article III contains another word that is at least as significant. That word favors petitioner's interpretation. The word is "he." The 180-day clock begins after *he*—the prisoner—"shall have caused" the request to be delivered. The focus is on the prisoner's act, and that act is complete when he transmits his request to the warden. That is the last time at which the inmate can be said to have done anything to "have caused to be delivered" the request. Any other reading renders the words "he shall have caused" superfluous.

Even if the provision's focus on the prisoner's act were not so clear, the statute could not be read as Michigan suggests. The provision's use of the future perfect tense is highly significant. Contrary to the majority's contention that "the future perfect would be an appropriate tense for both interpretations," *ante*, at 48, the logical way to express the idea that receipt must be perfected before the provision applies would be to start the clock 180 days "after he has caused the request *to have been delivered.*" But the IAD does not say that, nor does it use the vastly more simple, "after delivery."

That this construction was intentional is supported by the drafting history of the IAD. When the Council of State Governments proposed the agreement governing interstate detainers, it also proposed model legislation governing intrastate detainers. See Suggested State Legislation Program for 1957, pp. 77–78 (1956). Both proposals contained language virtually identical to the language in Article III(a). See *id.*, at 77. The Council stated that the intrastate proposal was "based substantially on statutes now operative in California and Oregon." *Id.*, at 76. Critically, however, neither State's provision referred to a delivery "caused" by the prisoner. The Oregon statute required trial "within 90 days of receipt" by the district attorney of the prisoner's notice, Act of Apr. 29, 1955, ch. 387, § 2(1), 1955 Ore. Laws 435, and the California law required trial "within ninety days after [he] shall have delivered" his request to the prosecutor, Act of May 28, 1931, ch. 486, § 1, 1931 Cal. Stats. 1060–1061. If, as Michigan insists here, see Tr. of Oral Arg. 23, 26, 37, the Council's use of "caused to be delivered" was somehow meant to convey "actual receipt," then the drafters' failure to follow the clear and uncomplicated model offered by the Oregon provision is puzzling in the extreme. When asked at oral argument about this failure, counsel for *amicus* the United States replied that "the problem with using the verb receive rather than the verb deliver in Article III is that . . . [t]hat would shift the focus away from the prisoner, and the prisoner has a vital role under article III . . . because he initiates the process." *Id.*, at 41. I submit that the focus on the prisoner is precisely the point, and that the reason the drafters used the language they did is because the 180-day provision is triggered by the action of the inmate.

Nevertheless, the majority finds the disputed language to be ambiguous, *ante*, at 47–48, and it exhibits no interest in the history of the IAD. Instead, the majority asserts that the answer to the problem is to be found in "the sense of the matter." *Ante*, at 49. But petitioner's reading prevails in the arena of "sense," as well.

I turn first to the majority's assumption that the 180-day provision is not triggered if the request is never delivered. Because "the IAD unquestionably requires *delivery*, and only after that has occurred can one entertain the possibility of counting the 180 days from the transmittal to the warden," *ante*, at 50, the majority attacks as illogical a reading under which the negligent or malicious warden—who can prevent entirely the operation of the 180-day rule simply by failing to forward the prisoner's request—could not *delay* the starting of the clock. *Ante*, at 49–50. That premise is flawed. Obviously, the rule anticipates actual delivery. Article III(b) requires prison officials to forward a prisoner's request promptly, as well. The fact that the rule for marking the start of the 180-day period is written in a fashion that contemplates actual delivery, however, does not mean that it cannot apply if the request is never delivered. Although the IAD assumes that its signatories will abide by its terms, I find nothing strange in the notion that the 180-day provision might be construed to apply as well to an unanticipated act of bad faith.[1]

Even on its own terms, the majority's construction is not faithful to the purposes of the IAD. The IAD's primary purpose is not to protect prosecutors' calendars, or even to protect prosecutions, but to provide a swift and certain means for resolving the uncertainties and alleviating the disabilities created by outstanding detainers. See Article I; *Carchman* v. *Nash*, 473 U. S. 716, 720 (1985); Note, The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction, 54 Ford. L. Rev. 1209, 1210, n. 12 (1986). If the 180 days from the prisoner's invocation of the IAD is allowed to stretch into 200 or 250 or 350 days, that purpose is defeated.

In each of this Court's decisions construing the IAD, it properly has relied upon and emphasized the purpose of the IAD. See *Carchman* v. *Nash*, 473 U. S., at 720, 729–734; *Cuyler* v. *Adams*, 449 U. S. 433, 448–450 (1981); *United*

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[1] For the prisoner aggrieved by a flagrant violation of the IAD, other remedies also may be available. The Courts of Appeals have split over the question of an IAD violation's cognizability on habeas. Compare, *e. g.*, *Kerr* v. *Finkbeiner*, 757 F. 2d 604 (CA4) (denying habeas relief), cert. denied, 474 U. S. 929 (1985), with *United States* v. *Williams*, 615 F. 2d 585, 590 (CA3 1980) (IAD violation cognizable on habeas). See generally M. Mushlin & F. Merritt, Rights of Prisoners 324 (Supp. 1992); Note, The Effect of Violations of the Interstate Agreement on Detainers on Subject Matter Jurisdiction, 54 Ford. L. Rev. 1209, 1212–1215 (1986); Note, Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers, 83 Colum. L. Rev. 975 (1983). At argument, the State and the United States, respectively, suggested that a sending State's failures can be addressed through a 42 U. S. C. § 1983 suit, Tr. of Oral Arg. 33, or a mandamus action, *id.*, at 44.

States v. *Mauro,* 436 U. S. 340, 361–362 (1978). The majority, however, gives that purpose short shrift, focusing instead on "worst-case scenarios," *ante,* at 49, and on an assessment of the balance of harms under each interpretation. Two assumptions appear to underlie that inquiry. The first—evident in the cursory and conditional nature of the concession that to spend several hundred additional days under detainer "is bad, given the intent of the IAD," *ante,* at 50—is that the burden of spending extra time under detainer is relatively minor. The failure to take seriously the harm suffered by a prisoner under detainer is further apparent in the majority's offhand and insensitive description of the practical impact of such status. To say that the prisoner under detainer faces "certain disabilities, such as disqualification from certain rehabilitative programs," *ibid.,* is to understate the matter profoundly. This Court pointed out in *Carchman* v. *Nash,* that the prisoner under detainer bears a very heavy burden:

> "'[T]he inmate is (1) deprived of an opportunity to obtain a sentence to run concurrently with the sentence being served at the time the detainer is filed; (2) classified as a maximum or close custody risk; (3) ineligible for initial assignments to less than maximum security prisons (i. e., honor farms or forestry camp work); (4) ineligible for trustee *[sic]* status; (5) not allowed to live in preferred living quarters such as dormitories; (6) ineligible for study-release programs or work-release programs; (7) ineligible to be transferred to preferred medium or minimum custody institutions within the correctional system, which includes the removal of any possibility of transfer to an institution more appropriate for youthful offenders; (8) not entitled to preferred prison jobs which carry higher wages and entitle [him] to additional good time credits against [his] sentence; (9) inhibited by the denial of possibility of parole or any commutation of his sentence; (10) caused anxiety and

> thus hindered in the overall rehabilitation process since he cannot take maximum advantage of his institutional opportunities.'" 473 U. S., at 730, n. 8, quoting *Cooper* v. *Lockhart,* 489 F. 2d 308, 314, n. 10 (CA8 1973).

These harms are substantial and well recognized. See, *e. g., Smith* v. *Hooey,* 393 U. S. 374, 379 (1969); *United States* v. *Ford,* 550 F. 2d 732, 737–740 (CA2 1977) (citing cases), aff'd *sub nom. United States* v. *Mauro,* 436 U. S. 340 (1978); L. Abramson, Criminal Detainers 29–34 (1979); Note, 54 Ford. L. Rev., at 1210, n. 12. More important for our purposes, they were the reason for the IAD's creation in the first place. The majority's sanguine reassurance that delays of several hundred days, while "bad," are "no worse than what regularly occurred before the IAD was adopted," *ante,* at 50, is thus perplexing. The fact that the majority's reading leaves prisoners no worse off than if the IAD had never been adopted proves nothing at all, except perhaps that the majority's approach nullifies the ends that the IAD was meant to achieve. Our task, however, is not to negate the IAD but to interpret it. That task is impossible without a proper understanding of the seriousness with which the IAD regards the damage done by unnecessarily long periods spent under detainer.

The majority's misunderstanding of the stakes on the inmate's side of the scale is matched by its miscalculation of the interest of the State. It is widely acknowledged that only a fraction of all detainers ultimately result in conviction or further imprisonment. See J. Gobert & N. Cohen, Rights of Prisoners 284 (1981); Dauber, Reforming the Detainer System: A Case Study, 7 Crim. L. Bull. 669, 689–690 (1971); Note, 54 Ford. L. Rev., at 1210, n. 12. It is not uncommon for a detainer to be withdrawn just prior to the completion of the prisoner's sentence. See *Carchman* v. *Nash,* 473 U. S., at 729–730; Note, 54 Ford. L. Rev., at 1210, n. 12; Comment, Interstate Agreement on Detainers and the Rights It Created, 18 Akron L. Rev. 691, 692 (1985). All too often, detainers are filed groundlessly or even in bad faith, see *United States* v. *Mauro,* 436 U. S., at 358, and n. 25, solely for the purpose of harassment, see *Carchman* v. *Nash,* 473 U. S., at 729, n. 6. For this reason, Article III is intended to provide the prisoner "'with a procedure for bringing about a prompt test of the substantiality of detainers placed against him by other jurisdictions.'" *Id.,* at 730, n. 6 (quoting House and Senate Reports).

These two observations—that detainers burden prisoners with onerous disabilities and that the paradigmatic detainer does not result in a new conviction—suggest that the majority has not properly assessed the balance of interests that underlies the IAD's design. Particularly in light of Article IX's command that the IAD "shall be liberally construed so as to effectuate its purposes," I find the majority's interpretation, which countenances lengthy and indeterminate delays in the resolution of outstanding detainers, impossible to sustain.

Finally, I must emphasize the somewhat obvious fact that a prisoner has no power of supervision over prison officials. Once he has handed over his request to the prison authorities, he has done all that he can do to set the process in motion. For that reason, this Court held in *Houston* v. *Lack,* 487 U. S. 266 (1988), that a *pro se* prisoner's notice of appeal is "filed" at the moment it is conveyed to prison authorities for forwarding to the district court. Because of the prisoner's powerlessness, the IAD's inmate-initiated 180-day period serves as a useful incentive to prison officials to forward IAD requests speedily. The Solicitor General asserts that the prisoner somehow is in a better position than are officials in the receiving State to ensure that his request is forwarded promptly, because, for example, "the prisoner can insist that he be provided with proof that his request has been mailed to the appropriate officials." Brief for United States as *Amicus Curiae* 16–17. This seems to me to be severely out of touch with reality. A prisoner's demands cannot be expected to generate the same degree of concern as do the inquiries and interests of a sister State. Because of the IAD's reciprocal nature, the signatories, who can press for a speedy turnaround from a position of strength, are far better able to bear the risk of a failure to meet the 180-day deadline.[2]

The IAD's 180-day clock is intended to give the prisoner a lever with which to move forward a process that will enable him to know his fate and perhaps eliminate burdensome conditions. It makes no sense to interpret the IAD so as to remove from its intended beneficiary the power to start that clock. Accordingly, I dissent.

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[2] Even the Solicitor General acknowledged that "a State that has been negligent in fulfilling its duty may well be subject to political pressure from other States that are parties to the IAD." Tr. of Oral Arg. 44. The fact that nevertheless in some cases the 180-day rule may cause legitimate cases to be dismissed is no small matter, but dismissal is, after all, the result mandated by the IAD. Moreover, where a diligent prosecutor is surprised by the late arrival of a request, I would expect that, under appropriate circumstances, a good-cause continuance would be in order. See Article III(a). (I acknowledge, however, that, as the majority points out, *ante,* at 51, n. 5, some courts have refused to grant a continuance after the expiration of the 180-day period.) The majority finds this obvious solution "implausible," but to me it is far more plausible than a regime under which the inmate is expected to "insist" that recalcitrant prison authorities move more quickly.

ITEL CONTAINERS INTERNATIONAL CORP. *v.* HUDDLESTON, COMMISSIONER OF REVENUE OF TENNESSEE

CERTIORARI TO THE SUPREME COURT OF TENNESSEE

No. 91–321. Argued October 14, 1992—Decided February 23, 1993

Petitioner Itel Containers International Corporation is a domestic company that leases cargo containers for use exclusively in international shipping. After paying under protest a Tennessee sales tax on its proceeds from the lease of containers delivered in the State, Itel filed a refund action, challenging the tax's constitutionality under the Commerce, Import-Export, and Supremacy Clauses. The last challenge was based on an alleged conflict with federal regulations and with two international Container Conventions signed by the United States: the 1956 Convention prohibiting the imposition of a tax "chargeable by reason of importation," and the 1972 Convention prohibiting taxes "collected on, or in connexion with, the importation of goods." The State Chancery Court reduced the assessment on state-law grounds but rejected the constitutional claims, and the State Supreme Court affirmed.

Held: Tennessee's sales tax, as applied to Itel's leases, does not violate the Commerce, Import-Export, or Supremacy Clause. Pp. 64–78.

(a) The sales tax is not pre-empted by the 1972 or 1956 Container Convention. The Conventions' text makes clear that only those taxes imposed based on the act of importation itself are disallowed, not, as Itel contends, all taxes on international cargo containers. The fact that other signatory nations may place only an indirect value added tax (VAT) on container leases does not demonstrate that Tennessee's direct tax on container leases is prohibited, because the Conventions do not distinguish between direct and indirect taxes. While the VAT system is not equivalent to Tennessee's sales tax for the purposes of calculation and assessment, it is equivalent for purposes of the Conventions: neither imposes a tax based on importation. The Federal Government agrees with this Court's interpretation of the Container Conventions, advocating a position that does not conflict with the one it took in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434. Pp. 64–69.

(b) The tax, which applies to domestic and foreign goods without differentiation, does not impede the federal objectives expressed in the Conventions and related federal statutes and regulations. The federal regulatory scheme for containers used in foreign commerce discloses no congressional intent to exempt those containers from all or most domestic taxation, in contrast to the regulatory scheme for customs bonded warehouses, which pre-empts most state taxes on warehoused goods, see, *e. g., McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414. Nor is the scheme so pervasive that it demonstrates a federal purpose to occupy the field of container regulation and taxation. The precise federal policy regarding promotion of container use is satisfied by a limited proscription against taxes that are imposed upon or discriminate against the containers' importation. Pp. 69–71.

(c) The tax does not violate the Foreign Commerce Clause under *Japan Line*'s three-part test. First, as concluded by the State Supreme Court and accepted by Itel, the tax satisfies the Domestic Commerce Clause test of *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274, 279. This conclusion confirms both the State's legitimate interest in taxing the transaction and the absence of an attempt to interfere with the free flow of commerce. Second, the tax does not create a substantial risk of multiple taxation implicating foreign commerce concerns because Tennessee is simply taxing a discrete transaction occurring within the State. Tennessee need not refrain from taxing a transaction merely because it is also potentially subject to taxation by a foreign sovereign. Moreover, Tennessee reduces, if not eliminates, the risk of multiple taxation by crediting against its own tax any tax paid in another jurisdiction on the same transaction. Third, the tax does not prevent the Federal Government from speaking with one voice when regulating commercial relations with foreign governments. The tax creates no substantial risk of multiple taxation, is consistent with federal conventions, statutes and regulations, and does not conflict with international custom. Pp. 71–76.

(d) The tax does not violate the Import-Export Clause under the test announced in *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276, 285–286. Because *Michelin*'s first component mirrors the *Japan Line* one voice requirement, and its third component mirrors the *Complete Auto* requirements, these components are satisfied for the same reasons the tax survives Commerce Clause scrutiny. *Michelin*'s second component—ensuring that import revenues are not being diverted from the Federal Government—is also met because Tennessee's tax is neither a tax on importation or imported goods nor a direct tax on imports and exports in transit within the meaning of *Richfield Oil Corp.* v. *State Bd. of Equalization,* 329 U. S. 69, 78–79, 84. Pp. 76–78.

814 S. W. 2d 29, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, SOUTER, and THOMAS, JJ., joined, and in all but Parts IV and V of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 78. BLACKMUN, J., filed a dissenting opinion, *post,* p. 82.

Philip W. Collier argued the cause for petitioner. With him on the briefs were *Andrew L. Frey, Charles Rothfeld,* and *Lisa D. Leach.*

Charles W. Burson, Attorney General of Tennessee, argued the cause for respondent. With him on the brief were *John Knox Walkup,* Solicitor General, and *Daryl J. Brand,* Assistant Attorney General.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Starr, Acting Assistant Attorney General Bruton, Deputy Solicitor General Wallace, Kent L. Jones, Gary R. Allen,* and *Ernest J. Brown.**

JUSTICE KENNEDY delivered the opinion of the Court.

In this case we consider the validity of a state tax affecting cargo containers used in international trade, a subject we have addressed once before. See *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434 (1979). We sustain Tennessee's sales tax on leases of containers owned by a domestic company and used in international shipping.

I

The use of large steel containers to transport goods by truck, rail, and oceangoing carrier was a major innovation in transportation technology. In 1990, the United States shipped, by value, 60% of its marine imports and 52% of its marine exports in these containers. Itel Containers International Corporation, the petitioner here, is a Delaware corporation with its principal place of business in California. Itel's primary business is leasing cargo containers to participants in the international shipping industry, and all its leases restrict use of its containers to international commerce. The leases are solicited and negotiated through Itel marketing offices in California, Illinois, New Jersey, South Carolina, Texas, and Washington, and the leased containers are delivered to lessees or their agents in many of the 50 States, including Tennessee. The Tennessee deliveries occur either at Itel's Memphis terminal or at several designated third-party terminals.

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*Briefs of *amici curiae* urging reversal were filed for the United Kingdom of Great Britain and Northern Ireland by *William Karas* and *David H. Coburn;* for Asia North America Eastbound Rate Agreement et al. by *Stanley O. Sher* and *David F. Smith;* and for the Institute of International Container Lessors et al. by *Thomas S. Martin* and *Edward A. Woolley.*

R. Frederic Fisher, Barry J. London, and *Lawrence N. Minch* filed a brief for the Pacific Merchant Shipping Association et al. as *amici curiae.*

In December 1986, the Tennessee Department of Revenue assessed $382,465 in sales tax, penalties, and interest on the proceeds Itel earned from leased containers delivered in Tennessee for the period of January 1983 through November 1986. Itel paid under protest and filed an action for a refund, challenging the constitutionality of the Tennessee tax under the Commerce Clause, the Import-Export Clause and the Supremacy Clause. The last challenge to the tax was based on an alleged conflict both with federal regulations and with two international conventions to which the United States is a signatory. Customs Convention on Containers, Dec. 2, 1972, [1975] 988 U. N. T. S. 43 (hereinafter 1972 Container Convention); Customs Convention on Containers, May 18, 1956, [1969] 20 U. S. T. 301, T. I. A. S. No. 6634 (hereinafter 1956 Container Convention). The Tennessee Chancery Court reduced the assessment to $158,012 on state-law grounds but rejected Itel's constitutional claims.

On appeal to the Supreme Court of Tennessee, Itel maintained that the Tennessee tax is pre-empted by the Container Conventions and their implementing federal regulations. The court concluded, however, that congressional regulation of cargo containers is not pervasive and that Congress has not otherwise acted to bar state sales taxes on cargo container leases. *Itel Containers Int'l Corp.* v. *Card-*

well, 814 S. W. 2d 29, 34 (1991). Instead, the court held, Congress merely prohibits the imposition of federal customs duties on containers, and that prohibition does not pre-empt Tennessee's sales tax, which is not a customs duty. *Id.,* at 35–36.

Itel also claimed that Tennessee's tax violates the Foreign Commerce Clause principles announced in *Japan Line, Ltd.* v. *County of Los Angeles, supra,* because the tax "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments'" and "creates a substantial risk of international multiple taxation." *Id.,* at 451. The state court rejected this argument because the tax is imposed only upon a discrete transaction—the transferred possession of cargo containers within Tennessee—and therefore does not risk multiple taxation or impede federal regulation of foreign trade. 814 S. W. 2d, at 36–37.

Last, Itel argued that the tax violates the Import-Export Clause because it prevents the Federal Government from speaking with one voice in international affairs and is a tax on exports that is *per se* impermissible under *Richfield Oil Corp.* v. *State Bd. of Equalization,* 329 U. S. 69 (1946). The court dismissed Itel's one voice argument for reasons similar to those given in its Commerce Clause analysis, 814 S. W. 2d, at 38, and held the Tennessee tax does not violate *Richfield*'s *per se* restriction because it is not a direct tax on the value of goods destined for export. 814 S. W. 2d, at 33. We granted certiorari, 502 U. S. 1090 (1992), and now affirm.

II

Itel's primary challenge is that the imposition of the Tennessee sales tax is proscribed by both the 1972 and 1956 Container Conventions. The Conventions restrict the authority of signatories to tax cargo containers by requiring signatory nations to grant the containers "temporary admission" into their borders, subject to exportation "within three months from the date of importation" unless this period is extended by customs authorities. 1972 Container Convention, Arts. 3 and 4; 1956 Container Convention, Arts. 2 and 3. Temporary admission status permits the containers to enter a nation "free of import duties and taxes" under the 1972 Convention and "free of import duties and import taxes" under the 1956 Convention. 1972 Container Convention, Art. 1; 1956 Container Convention, Art. 2.

The Conventions define these key phrases in similar terms. The 1972 Convention defines "import duties and taxes" to mean "Customs duties and all other duties, taxes, fees and other charges which are collected on, or in connexion with, the importation of goods, but not including fees and charges limited in amount to the approximate cost of services rendered." 1972 Container Convention, Art. 1. The 1956 Convention defines "import duties and import taxes" to mean "not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation." 1956 Container Convention, Art. 1. Itel does not claim the Tennessee sales taxes on its container leases is a "Customs dut[y]" under either Convention. Rather, it says that because its containers would not be available for lease, and hence taxation, in Tennessee but for their importation into the United States, the Tennessee tax must be a tax "collected on, or in connexion with, the importation of goods" in contravention of the 1972 Convention and a tax "chargeable by reason of importation" in contravention of the 1956 Convention.

We cannot accept Itel's interpretation of the Container Conventions. Our interpretation must begin, as always, with the text of the Conventions. See *Air France* v. *Saks*, 470 U. S. 392, 397 (1985). The text, instead of supporting Itel's broad construction, makes clear that it is the reason a State imposes a tax, not the reason for the presence of the containers within a State's jurisdiction, that determines whether a tax violates the Container Conventions. The

Conventions thus disallow only those taxes imposed based on the act of importation itself. In contrast, Itel's interpretation would bar all taxes on containers covered by the Conventions, because each covered container is, by definition, in the United States as a result of its temporary importation. This reading makes superfluous the Conventions' qualifying language that the only taxes proscribed are those "collected on, or in connexion with, the importation of goods" and those "chargeable by reason of importation." 1972 Container Convention, Art. 1; 1956 Container Convention, Art. 1.

In an attempt to counteract the interpretation that the Conventions prohibit only those taxes based on the importation of containers, Itel asserts that the consistent practice of other signatory nations and a prior interpretation of the 1956 Convention by the United States prove that signatory nations read the Conventions to proscribe all taxes on containers within their borders. See *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–295 (1933). Itel, however, overstates the probative value of these actions.

As evidence that other signatory nations free cargo containers of all domestic taxation, Itel places primary reliance on the Economic Community Sixth Directive and the United Kingdom Value Added Tax (VAT), as illuminated in an *amicus* brief filed by the United Kingdom. Brief for United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 7–9. Under the European VAT system, no direct tax, be it a VAT, sales, or use tax, is imposed on the value of international container leases. See Sixth Council Directive of May 17, 1977, Arts. 14(1)(i) and 15(13), reprinted in CCH Common Mkt. Rep. ¶¶ 3165P and 3165Q.

The value of international container leases, however, is included in the cost of transporting goods, which in turn is added to the value of the goods when calculating VAT tax liability. Itel admits this is tantamount to an indirect tax on the value of international container leases, but claims the distinction between an indirect tax (paid by the consumer of import goods) and a direct tax on the container itself (paid by either the lessor or lessee of the container) is significant. Whether or not, in the abstract, there is a significant difference between direct and indirect taxation, the Container Conventions do not distinguish between the two methods or differentiate depending upon the legal incidence of a tax. For example, the first declaration in both Convention Protocols of Signature states that inclusion of the weight or value of containers in the weight or value of goods for calculating import duties and taxes upon those goods conflicts with the Conventions, even though this would be only an indirect tax on the containers and the legal incidence of the tax would not fall on the container lessor or lessee. 1972 Container Convention, Protocol of Signature, [1975] 988 U. N. T. S., at 74; 1956 Container Convention, Protocol of Signature, [1969] 20 U. S. T., at 326. The Conventions, in short, prohibit both direct and indirect taxes imposed based on the importation of a container, but permit direct and indirect taxes imposed on some other basis.

As further evidence in support of its position, Itel points to the statements of signatory nations objecting to Tennessee's taxation of container leases. With all due respect to those statements, we adhere to our interpretation. We are mindful that 11 nations (Denmark, Finland, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden, and the United Kingdom), each a signatory to at least one Container Convention, have sent a diplomatic note to the United States Department of State submitting that they do not "impose sales taxes (or equivalent taxes of different nomenclatures) on the lease of cargo containers that are used in international commerce among the Contracting Parties to the Conventions." App. to Brief for United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 1a. The meaning these nations ascribe to the phrase "equivalent taxes" is not clear. For purposes of calculation and assessment, the European VAT system, enacted in most of the objecting nations, is by no means equivalent to a sales tax. See *Trinova Corp.* v. *Michigan Dept. of Treasury,* 498 U. S. 358, 365–366, n. 3 (1991). But as we discussed above, for the purpose of determining whether a tax is one based on importation, the European VAT system is equivalent to Tennessee's sales tax system—that is, neither system imposes a tax based on the act of importation. Only this latter form of equivalence is relevant under the Container Conventions.

Directing our attention to the *amicus* brief filed by the United States in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434 (1979), Itel next claims the United States Government once interpreted the 1956 Container Convention to prohibit all domestic taxes on international cargo containers. Even if this were true, the Government's current position is quite different; its *amicus* brief in this case expresses agreement with our interpretation of both the 1972 and the 1956 Container Conventions. Brief for United States as *Amicus Curiae* 12.

In its *amicus* brief in *Japan Line,* moreover, the United States did not say that the 1956 Container Convention prohibited the imposition of any domestic tax on international cargo containers. Its position was simply that under the 1956 Convention the United States gave containers "the same status it gives under the customs laws to articles admitted to a 'bonded manufacturing warehouse.'" Brief for United States as *Amicus Curiae* in *Japan Line, Ltd.* v. *County of Los Angeles,* O. T. 1978, No. 77–1378, p. 25 (quoting 19 U. S. C. § 1311). Starting from this premise the Government argued that, like state taxes on goods in customs bonded warehouses destined for foreign trade, see *McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414, 428–429 (1940), state taxes on containers would frustrate a federal scheme designed to benefit international commerce. Brief for United States as *Amicus Curiae* in *Japan Line,* at 27–29, and n. 22. We declined, and continue to decline, to adopt this expansive view of *McGoldrick* and the pre-emptive effect of the Container Conventions. See *infra,* at 70–71. And, in any event, the Government's pre-emption argument in *Japan Line* does not conflict with its present interpretation that the Container Conventions themselves are violated only by a tax assessed upon the importation of containers.

Tennessee's sales tax is imposed upon the "transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration." Tenn. Code Ann. § 67–6–102(23)(A) (Supp. 1992). It is a sales tax of general application that does not discriminate against imported products either in its purpose or effect. Indeed, its assessment bears no relation to importation whatsoever. The tax is not pre-empted by the 1972 or 1956 Container Convention.

III

Itel next argues that the application of Tennessee's sales tax to its container leases is pre-empted because it would frustrate the federal objectives underlying the Container Conventions and the laws and regulations granting favored status to international containers, in particular 19 U. S. C. § 1322 and 19 CFR § 10.41a (1992). See *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941) (state law pre-empted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). The federal regulatory scheme for cargo containers, it claims, parallels the regulatory scheme creating customs bonded warehouses which we have found to pre-empt most state taxes on warehoused goods. *R. J. Reynolds Tobacco Co.* v. *Durham County,* 479 U. S. 130 (1986); *Xerox Corp.* v. *County of Harris,* 459 U. S. 145 (1982); *McGoldrick* v. *Gulf Oil Corp., supra.*

Itel's reliance on these decisions is misplaced. In *McGoldrick* and its progeny, we stated that Congress created a system for bonded warehouses where imports could be stored free of federal customs duties while under the continuous supervision of local customs officials "in order to encourage merchants here and abroad to make use of American ports." *Xerox Corp., supra,* at 151. By allowing importers to defer taxes on imported goods for a period of time and to escape taxes altogether on reexported goods, the bonded warehouse system "enabled the importer, without any threat of financial loss, to place his goods in domestic markets or to return them to foreign commerce and, by this flexibility, encouraged importers to use American facilities." *R. J. Reynolds Tobacco Co., supra,* at 147. This federal objective would be frustrated by the imposition of state sales and property taxes on goods not destined for domestic distribution, regardless of whether the taxes themselves discriminated against goods based on their destination. *Xerox Corp., supra,* at 150–154. See also *R. J. Reynolds Tobacco Co., supra,* at 144–147; *McGoldrick, supra,* at 428–429.

In contrast, the federal regulatory scheme for containers used in foreign commerce discloses no congressional intent to exempt those containers from all or most domestic taxation. In *Japan Line* we said that the 1956 Container Convention acknowledged "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce" and "reflect[ed] a national policy to remove impediments to the use of containers." 441 U. S., at 452–453. But we did not hold that the Convention and the federal regulatory scheme for cargo containers expressed a national policy to exempt containers from all domestic taxation. Rather, we relied on the federal laws, along with proof of an international customary norm of home port taxation and California's creation of an asymmetry in international maritime taxation, for our conclusion that California's ad valorem property tax violated the Foreign Commerce Clause by impeding the Government's ability to " 'spea[k] with one voice' " in conducting our Nation's foreign affairs. *Ibid.*

Itel does not better its pre-emption argument by claiming that the federal regulatory scheme for containers, like the customs bonded warehouse scheme, is so pervasive that it demonstrates a federal purpose to occupy the field of container regulation and taxation. We doubt that the container regulatory scheme can be considered as pervasive as the customs warehouse scheme. The latter provides for continual federal supervision of warehouses, strict bonding requirements, and special taxing rules, see 19 U. S. C. §§1555 and 1557; 19 CFR pt. 19 (1992), whereas the former is limited more to the general certification and taxing of containers, see 19 U. S. C. §1322; 19 CFR §§10.41a and 115.25–115.43 (1992). Even if Itel were correct on this point, however, we have not held that state taxation of goods in bonded warehouses is pre-empted by Congress' intent to occupy the field of bonded warehouse regulation. In fact, in *R. J. Reynolds* we specifically held that the bonded warehouse statutes and regulations did not evidence such a purpose. 479 U. S., at 149. So, too, we cannot conclude that in adopting laws governing the importation of containers Congress intended to foreclose any and all concurrent state regulation or taxation of containers.

The precise federal policy regarding promotion of container use is satisfied by a proscription against taxes that are imposed upon, or discriminate against, the importation of containers. We find that Tennessee's general sales tax, which applies to domestic and foreign goods without differentiation, does not impede the federal objectives expressed in the 1972 and 1956 Container Conventions and related federal statutes and regulations.

IV

A

Itel's third challenge to Tennessee's tax on container leases is that the tax violates the Foreign Commerce Clause as interpreted by *Japan Line.* U. S. Const., Art. I, §8, cl. 3. We began our analysis in *Japan Line* with a reformulation of the Foreign Commerce Clause test:

> "In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto* [*Transit, Inc.* v. *Brady,* 430 U. S. 274, 279 (1977)], a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" 441 U. S., at 451.

Without passing on the point, we assumed the California property tax in question would have met the test of *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274 (1977). See 441 U. S., at 451. Proceeding to the two foreign commerce requirements we had identified, we found the California tax incompatible with both. We held that because Japan had the established right, consistent with the custom of nations, see *id.,* at 447, to tax the property value of the containers in full, California's tax "produce[d] multiple taxation in fact," *id.,* at 452. We held further that California's tax prevented the United States from speaking with one voice in foreign affairs, in that "[t]he risk of retaliation by Japan, under these circumstances, [was] acute, and such retaliation of necessity would be felt by the Nation as a whole." *Id.,* at 453.

Four years later we again addressed whether a California tax offended the Foreign Commerce Clause, this time in the context of a unitary business income tax. *Container Corp. of America* v. *Franchise Tax Bd.,* 463 U. S. 159 (1983). Although recognizing that California's income tax shared some of the same characteristics as the property tax involved in *Japan Line,* see 463 U. S., at 187, we nevertheless upheld it based on two distinguishing characteristics.

First, the problem of double taxing in *Container Corp.,* "although real, [was] not the 'inevitabl[e]' result of the California [income] taxing scheme." *Id.,* at 188 (quoting *Japan Line, supra,* at 447). On the other hand, "[i]n *Japan Line,* we relied strongly on the fact that one taxing jurisdiction claimed the right to tax a given value in full, and another taxing jurisdiction claimed the right to tax the same entity in part—a combination resulting necessarily in double taxation." 463 U. S., at 188. That the *Japan Line* Court adopted a rule requiring States to forgo assessing property taxes against foreign-owned cargo containers "was by no means unfair, because the rule did no more than reflect consistent international practice and express federal policy." *Container Corp., supra,* at 190.

Second, we noted that "in *[Container Corp.]*, unlike *Japan Line*, the Executive Branch ha[d] decided not to file an *amicus curiae* brief in opposition to the state tax." 463 U. S., at 195. Together with our conclusion that the California income tax did not result in automatic double taxation, the Government's nonintervention suggested that the tax presented no serious threat to United States foreign policy. See *id.*, at 196.

B

Before reconciling the holdings of *Japan Line* and *Container Corp.*, we first address the *Complete Auto* test, a test we assumed, *arguendo*, was satisfied by the tax in *Japan Line*. 441 U. S., at 451. A state tax satisfies the *Complete Auto* Domestic Commerce Clause test "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto, supra,* at 279. Because Itel accepts the Supreme Court of Tennessee's conclusion that "Tennessee's sales tax meets the four-fold requirements of *Complete Auto*," 814 S. W. 2d, at 36, we need not retrace that court's careful analysis. We do note, however, that Tennessee's compliance with the *Complete Auto* test has relevance to our conclusion that the state tax meets those inquiries unique to the Foreign Commerce Clause. That the tax is a fair measure of the State's contacts with a given commercial transaction in all four aspects of the *Complete Auto* test confirms both the State's legitimate interest in taxing the transaction and the absence of an attempt to interfere with the free flow of commerce, be it foreign or domestic.

C

We proceed to evaluate the tax under *Japan Line*'s two Foreign Commerce Clause factors. Left to decide whether Tennessee's tax rests on the *Japan Line* or the *Container Corp.* side of the scale, we have no doubt that the analysis and holding of *Container Corp.* control.

Itel asserts that Tennessee's law invites multiple taxation of container leases because numerous foreign nations have a sufficient taxing nexus with the leases to impose equivalent taxes, and many nations in fact would do so were it not for the Container Conventions' prohibitions. As an initial matter, of course, we have concluded that the Conventions do not prohibit Tennessee's sales tax or equivalent taxes imposed by other nations. To the extent Tennessee has invited others to tax cargo container leases, foreign sovereigns, in an exercise of their independent judgment, have chosen not to accept.

Furthermore, the Foreign Commerce Clause cannot be interpreted to demand that a State refrain from taxing any business transaction that is also potentially subject to taxation by a foreign sovereign. "*Japan Line* does not require forbearance so extreme or so one-sided." *Container Corp., supra,* at 193. Tennessee has decided to tax a discrete transaction occurring within the State. See *Wardair Canada Inc.* v. *Florida Dept. of Revenue,* 477 U. S. 1, 9 (1986). And, according to its interpretation of its revenue code, which we accept, Tennessee credits against its own tax any tax properly paid in another jurisdiction, foreign or domestic, on the same transaction. Tenn. Code Ann. §67–6–313(f) (1989). By these measures, Tennessee's sales tax reduces, if not eliminates, the risk of multiple international taxation. Absent a conflict with a "consistent international practice

[or] . . . federal policy," *Container Corp.*, 463 U. S., at 190, the careful apportionment of a state tax on business transactions conducted within state borders does not create the substantial risk of international multiple taxation that implicates Foreign Commerce Clause concerns.

Itel further claims that if other States in this country follow Tennessee's lead and tax international container leases, the United States will be unable to speak with one voice in foreign trade because international container leases will be subject to various degrees of domestic taxation. As a consequence, Itel insists, container owners and users will be hit by retaliatory foreign taxes. To the extent Itel is arguing that the risk of double taxation violates the one voice test, our response is the same as above: Tennessee's tax does not create the substantial risk of international multiple taxation that implicates Foreign Commerce Clause concerns.

To the extent Itel is arguing that taxes like Tennessee's engender foreign policy problems, the United States disagrees. The Federal Government, in adopting various conventions, statutes, and regulations that restrict a State's ability to tax international cargo containers in defined circumstances, has acted on the subject of taxing cargo containers and their use. It has chosen to eliminate state taxes collected in connection with the importation of cargo containers. The state tax here does not fall within that proscription, and the most rational inference to be drawn is that this tax, one quite distinct from the general class of import duties, is permitted. Unlike in *Japan Line* or *Container Corp.*, moreover, the United States has filed an *amicus* brief defending Tennessee's law: "Far from conflicting with international custom, the Tennessee tax appears to promote it. The Tennessee tax thus does not interfere with our ability 'to speak with one voice' on this issue involving foreign commerce." Brief for United States as *Amicus Curiae* 24. This submission "is by no means dispositive." *Container Corp.*, 463 U. S., at 195–196. But given the strong indications from Congress that Tennessee's method of taxation is allowable, and with due regard for the fact that the nuances of foreign policy "are much more the province of the Executive Branch and Congress than of this Court," *id.*, at 196, we find no reason to disagree with the United States' submission that Tennessee's tax does not infringe the Government's ability to speak with one voice when regulating commercial relations with other nations. "It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Wardair Canada, supra,* at 12.

V

Itel's final avenue of attack on the Tennessee tax is that, as applied to international container leases, it violates the Import-Export Clause. U. S. Const., Art. I, § 10, cl. 2. Our modern Import-Export Clause test was first announced in *Michelin Tire Corp.* v. *Wages,* 423 U. S. 276, 285–286 (1976):

> "The Framers of the Constitution . . . sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Ibid.* (footnotes omitted).

The first and third components in this formulation mirror inquiries we have already undertaken as part of our Foreign Commerce Clause analysis. That is, the one voice component of the *Michelin* test is the same as the one voice component of our *Japan Line* test. *Japan Line,* 441 U. S., at 449–450, n. 14. And the state harmony component parallels the four *Complete Auto* requirements of the Foreign and Domestic Commerce Clause. *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734, 754–755 (1978) ("The third Import-Export Clause policy . . . is vindicated if the tax falls upon a taxpayer with a reasonable nexus to the State, is properly apportioned, does not discriminate, and relates reasonably to services provided by the State"). Having concluded that the Tennessee tax survives Commerce Clause scrutiny, we must conclude the tax is consistent with the first and third component of our *Michelin* test.

This leaves only *Michelin*'s second component: ensuring that import revenues are not being diverted from the Federal Government. We need not provide a detailed explanation of what, if any, substantive limits this aspect of *Michelin* places on state taxation of goods flowing through international channels, for the tax here is not a tax on importation or imported goods, but a tax on a business transaction occurring within the taxing State. The tax does not draw revenue from the importation process and so does not divert import revenue from the Federal Government. For similar reasons, we reject the argument that the tax violates the prohibition on the direct taxation of imports and exports "in transit," the rule we followed in *Richfield Oil,* 329 U. S., at 78–79, 84. Even assuming that rule has not been altered by the approach we adopted in *Michelin,* it is inapplicable here. Tennessee's sales tax is levied on leases transferring temporary possession of containers to third parties in Tennessee; it is not levied on the containers themselves or on the goods being imported in those containers. The tax thus does not divert import revenue from the Federal Government because "the taxation falls upon a service distinct from [import] goods and their value." *Washington Stevedoring, supra,* at 757. See also *Canton R. Co.* v. *Rogan,* 340 U. S. 511, 513–514 (1951).

VI

For the reasons we have stated, we hold that Tennessee's sales tax, as applied to Itel's international container leases, does not violate the Commerce, Import-Export or Supremacy Clause. The judgment of the Supreme Court of Tennessee is affirmed.

It is so ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join all of the Court's opinion except those sections disposing of the petitioner's "negative" Foreign Commerce Clause and Import-Export Clause arguments (Parts IV and V, respectively). As to those sections, I concur only in the judgment of the Court.

I have previously recorded my view that the Commerce Clause contains no "negative" component, no self-operative prohibition upon the States' regulation of commerce. "The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce." *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue,* 483 U. S. 232, 263 (1987) (SCALIA, J., concurring in part and dissenting in part); see also *American Trucking Assns., Inc.* v. *Smith,* 496 U. S. 167, 202–203 (1990) (SCALIA, J., concurring in judgment). On *stare decisis* grounds, however, I will enforce a self-executing, "negative" Commerce Clause in two circumstances: (1) against a state law that facially discriminates against interstate commerce,[1] and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.[2] These acknowledgments of precedent serve the principal purposes of *stare decisis*, which are to protect reliance interests and to foster stability in the law. I do not believe, however, that either of those purposes is significantly furthered by continuing to apply the vague and open-ended tests that are the current content of our negative Commerce Clause jurisprudence, such as the four-factor test set forth in *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274, 279 (1977), or the "balancing" approach of *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970). Unlike the prohibition on rank discrimination against interstate commerce, which has long and consistently appeared in the precedents of this Court, see *New Energy Co. of Ind.* v. *Limbach,* 486 U. S. 269, 273 (1988), those tests are merely the latest in a series of doctrines that we have successively applied, and successively discarded, over the years, to invalidate nondiscriminatory state taxation and regulation—including, for example, the "original package" doctrine, see *Leisy* v. *Hardin,* 135 U. S. 100 (1890), the "uniformity" test, see *Case of the State Freight Tax,* 15 Wall. 232, 279–280 (1873); cf. *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Society for Relief of Distressed Pilots,* 12 How. 299, 319 (1852), the "directness" test, see *Hall* v. *DeCuir,* 95 U. S. 485, 488–489 (1878), and the "privilege of doing interstate business" rule, see *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602, 609 (1951). Like almost all their predecessors, these latest tests are so uncertain in their application (and in their anticipated life-

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[1] See *Healy* v. *Beer Institute,* 491 U. S. 324, 344 (1989) (SCALIA, J., concurring in part and concurring in judgment); *New Energy Co. of Ind.* v. *Limbach,* 486 U. S. 269 (1988); *Trinova Corp.* v. *Michigan Dept. of Treas-*

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ury, 498 U. S. 358, 387 (1991) (SCALIA, J., concurring in judgment); *Amerada Hess Corp.* v. *Director, Div. of Taxation, N. J. Dept. of Treasury,* 490 U. S. 66, 80 (1989) (SCALIA, J., concurring in judgment); *American Trucking Assns., Inc.* v. *Scheiner,* 483 U. S. 266, 304 (1987) (SCALIA, J., dissenting).

[2] See *American Trucking Assns., Inc.* v. *Smith,* 496 U. S. 167, 204 (1990); *Quill Corp.* v. *North Dakota,* 504 U. S. 298, 320–321 (1992) (SCALIA, J., concurring in part and concurring in judgment).

span) that they can hardly be said to foster stability or to engender reliance deserving of *stare decisis* protection.

I have not hitherto had occasion to consider an asserted application of the negative Commerce Clause to commerce "with foreign Nations"—as opposed to commerce "among the several States"—but the basic point that the Commerce Clause is a power conferred upon Congress (and not a power denied to the States) obviously applies to all portions of the Clause. I assume that, for reasons of *stare decisis,* I must apply the same categorical prohibition against laws that facially discriminate against foreign commerce as I do against laws that facially discriminate against interstate commerce—though it may be that the rule is not as deeply rooted in our precedents for the former field. I need not reach that issue in the present case, since the Tennessee tax is nothing more than a garden-variety state sales tax that clearly does not discriminate against foreign commerce. As with the Interstate Commerce Clause, however, *stare decisis* cannot bind me to a completely indeterminate test such as the "four-factored test plus two" found in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434, 446–451 (1979), which combines *Complete Auto* with two *additional* tests.

Japan Line, like *Complete Auto* and *Pike,* ultimately asks courts to make policy judgments—essentially, whether nondiscriminatory state regulations of various sorts are "worth" their effects upon interstate or foreign commerce. One element of *Japan Line,* however, the so-called "speak with one voice" test, has a peculiar effect that underscores the inappropriateness of our engagement in this enterprise of applying a negative Commerce Clause. Applied literally, this test would always be satisfied, since no state law can ever actually "*prevent* this Nation from 'speaking with one voice' in regulating foreign commerce," *Japan Line, supra,* at 451 (emphasis added), or "interfere with [the United States'] *ability* 'to speak with one voice,'" Brief for United States as *Amicus Curiae* 24 (emphasis added). The National Government can always explictly pre-empt the offending state law. What, then, does the "one voice" test mean? Today, the Court relies on two considerations in determining that Tennessee's tax passes it: (1) that federal treaties, statutes and regulations restrict a State's ability to tax containers in certain defined circumstances, and the state tax here does not fall within those proscriptions; and (2) that the Government has filed an *amicus* brief in support of the State. *Ante,* at 75–76. The first of these considerations, however, does not distinguish the ad valorem property tax invalidated in *Japan Line,* which would also not violate the Container Conventions or the relevant federal statutes and regulations as construed in today's opinion, *ante,* at 65–66, 71. The second consideration does distinguish *Japan Line,* and it thus appears that a ruling on the *constitutionality* of a state law ultimately turns on the position of the Executive Branch. Having appropriated a power of Congress for its own use, the Court now finds itself, at least in the area of foreign commerce, incompetent to wield that power, and passes it off (out of "due regard" for foreign-policy expertise) to the President. *Ante,* at 76. I certainly agree that he is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.

Petitioner's Import-Export Clause challenge is, for me, a more difficult matter. It has firm basis in a constitutional text that cannot be avoided by showing that the tax on imports and exports is nondiscriminatory.[3] See *Richfield Oil Corp.* v. *State Bd. of Equalization,* 329 U. S. 69, 76 (1946). To come within this constitutional exemption, however, the taxed good must be either an import or an export "at the time the tax accrued." *Id.*, at 78. I do not think a good can be an export when it will be used in this country, for its designed purpose, before being shipped abroad. In *Richfield*, the Court held that California could not impose its nondiscriminatory sales tax on a shipment of oil that was being exported to New Zealand. The tax accrued upon the delivery of the oil to the purchaser, which was accomplished by pumping the oil into the hold of the vessel that would transport it overseas. The *Richfield* Court noted not only that no portion of the oil was "used or consumed in the United States," *id.*, at 71, but also that "there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use," *id.*, at 83. With respect to the containers at issue in the present case, by contrast, it was entirely certain that after the time at which the tax accrued (viz., upon delivery of the empty containers to the lessee) they would be used in this country, to be loaded with goods for export. See Brief for Petitioner 7 ("[E]ach [leased] container initially was used to export American goods to foreign ports"). It could not be said, when the tax attached, that "the process of [their] exportation ha[d] started." *Richfield, supra,* at 82. Because I find that the containers at issue were not protected by the Import-Export Clause, I need not consider whether the Tennessee tax would satisfy the test set forth in *Michelin Tire Corp.* v. *Wages*, 423 U. S. 276 (1976).

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[3] The Import-Export Clause provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." U. S. Const., Art. I, § 10, cl. 2.

For the reasons stated, I concur in the Court's conclusion that Tennessee's tax is not unconstitutional under the Foreign Commerce Clause or the Import-Export Clause.

Justice Blackmun, dissenting.

It is established "that a treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it' and that '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *United States* v. *Stuart,* 489 U. S. 353, 368 (1989), quoting *Bacardi Corp. of America* v. *Domenech,* 311 U. S. 150, 163 (1940); see also *Nielsen* v. *Johnson,* 279 U. S. 47, 51–52 (1929). This Court recognized in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U. S. 434 (1979), that the Container Conventions reflect a "national policy to remove impediments to the use of containers as 'instruments of international traffic.'" *Id.,* at 453, quoting 19 U. S. C. § 1322(a); see Customs Convention on Containers, Dec. 2, 1972, [1975] 988 U. N. T. S. 43 (hereinafter 1972 Convention); Customs Convention on Containers, May 18, 1956, [1969] 20 U. S. T. 301, T. I. A. S. No. 6634 (hereinafter 1956 Convention). Tennessee's tax clearly frustrates that policy.

In concluding that Tennessee's tax is not prohibited, the majority studiously ignores the realities of container leasing. All petitioner's containers are dedicated to international commerce, which means that they spend no more than three months at a time in any one jurisdiction. See 1972 Convention, Art. 4; 1956 Convention, Art. 3. Furthermore, transferring containers to new lessees is an integral part of any container-leasing operation. A major advantage of leasing rather than owning a container is that a shipper may return the container to the lessor at or near the shipment destination without having to provide for the return transport of the container. J. Tan, Containers: The Lease-Buy Decision 13 (London, International Cargo Handling Co-ordination Association, 1983). The lessor then transfers the container to another shipper who needs to carry goods from that location or transports the container to another location where it is needed. Leased containers like those of petitioner are constantly crossing national boundaries and are constantly being transferred to new lessees at the ends of their journeys. Whether Tennessee taxes the act of importation or the act of transfer makes little difference with respect to leased containers. Each kind of tax imposes substantial "impediments to the use of containers as 'instruments of international traffic.'" *Japan Line,* 441 U. S., at 453, quoting 19 U. S. C. § 1322(a), and each, in my view, is prohibited by the Container Conventions.

This is also the view of the other signatory nations to the Conventions. Their consistent practice is persuasive evidence of the Conventions' meaning. See *Air France* v. *Saks,* 470 U. S. 392, 396 (1985), quoting *Choctaw Nation* v. *United States,* 318 U. S. 423, 431–432 (1943) ("'[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to . . . the practical construction adopted by the parties'"). Neither Tennessee nor the United States as *amicus curiae* can point to any other jurisdiction that directly taxes the lease of containers used in international commerce. Under the European Value Added Tax (VAT) system, as the majority acknowledges, *ante,* at 66, no direct tax is imposed on the value of international container leases.

In an attempt to make international practice fit its reading of the Conventions, the majority mistakenly equates the European VAT on *goods* with Tennessee's tax on *containers.* See *ante,* at 66–67. The European VAT is analogous to an American sales tax but is imposed on the value added to goods at each stage of production or distribution rather than on their sale price. See *Trinova Corp.* v. *Michigan Dept. of Treasury,* 498 U. S. 358, 365–366, n. 3 (1991). The act of transporting goods to their place of sale adds to their value and the cost of transportation is reflected in their price. An American sales tax reaches the cost of transportation as part of the sale price of goods. The European VAT taxes the cost of transportation as part of the value added to goods during their distribution. Tennessee's analogue to the European VAT is its sales tax on goods imported by container, not its direct tax on the proceeds of container leases. Petitioner does not argue that Tennessee must refrain from imposing a sales tax on goods imported by container. It argues, instead, that like every other party to the Conventions, Tennessee may not impose a direct tax on containers themselves.

Even if Tennessee's tax did not violate the Container Conventions, it would violate the Foreign Commerce Clause by preventing the United States from "speaking with one voice" with respect to the taxation of containers used in international commerce. See *Japan Line,* 441 U. S, at 452; *Container Corp. of America* v. *Franchise Tax Bd.,* 463 U. S. 159, 193 (1983). This Court noted in *Japan Line* that the Conventions show "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce." 441 U. S., at 452. Tennessee's tax frustrates that uniformity.

The Court correctly notes that the Solicitor General's decision to file an *amicus* brief defending the tax "'is by no means dispositive.'" *Ante,* at 75, quoting *Container Corp.,* 463 U. S., at 195–196. Indeed, such a submission, consistent with the separation of powers, may not be given any weight beyond its power to persuade. The constitutional power over foreign affairs is shared by Congress and the President, see, *e. g.,* U. S. Const., Art. I, §8, cl. 11 (Congress shall have the power to declare war); Art. II, §2, cl. 2 (President shall have the power, by and with the advice and consent of the Senate, to make treaties); and Art. II, §3 (President shall receive ambassadors), but the power to regulate commerce with foreign nations is textually delegated to Congress alone, Art. I, §8, cl. 3. "It is well established that *Congress* may authorize States to engage in regulation that the Commerce Clause would otherwise forbid," *Maine* v. *Taylor,* 477 U. S. 131, 138 (1986) (emphasis added), but the President may not authorize such regulation by the filing of an *amicus* brief.

While the majority properly looks to see whether Congress intended to permit a tax like Tennessee's, it mistakenly infers permission for the tax from Congress' supposed failure to prohibit it. *Ante,* at 75–76. "[T]his Court has exempted state statutes from the implied limitations of the [Commerce] Clause only when the congressional direction to do so has been 'unmistakably clear.'" *Taylor,* 477 U. S., at 139, quoting *South-Central Timber Development, Inc.* v. *Wunnicke,* 467 U. S. 82, 91 (1984). "The need for affirmative approval is heightened by the fact that [Tennessee's tax] has substantial ramifications beyond the Nation's borders." *Id.,* at 92, n. 7. Not only does the majority invert this analysis by finding congressional authorization for the tax in congressional silence, but it finds silence only by imposing its own narrow reading on the Conventions.

The majority invites States that are constantly in need of new revenue to impose new taxes on containers. The result, I fear, will be a patchwork of state taxes that will burden international commerce and frustrate the purposes of the Container Conventions. I respectfully dissent.

UNITED STATES *v.* DUNNIGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91-1300. Argued December 2, 1992—Decided February 23, 1993

At respondent's federal trial for conspiracy to distribute cocaine, the Government's case in chief consisted of five witnesses who took part in, or observed, her cocaine trafficking. As the sole witness in her own defense, respondent denied the witnesses' inculpatory statements and claimed she had never possessed or distributed cocaine. In rebuttal, the Government called an additional witness and recalled one of its earlier witnesses, both of whom testified that respondent sold crack cocaine to them. Respondent was convicted and sentenced pursuant to the United States Sentencing Guidelines. Finding that she had committed perjury, the District Court enhanced her sentence, which is required under § 3C1.1 of the Guidelines when a "defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense." In reversing the sentence, the Court of Appeals found that a § 3C1.1 enhancement based on a defendant's alleged perjury would be unconstitutional. It also distinguished the precedent of *United States* v. *Grayson,* 438 U. S. 41—in which this Court upheld a sentence increase stemming from an accused's false testimony at trial—on the grounds that § 3C1.1's goal is punishment for obstruction of justice rather than rehabilitation, and that, in contravention of the admonition in *Grayson,* § 3C1.1 is applied in a wooden or reflex fashion to enhance the sentences of all defendants whose testimony is deemed false.

Held: Upon a proper determination that the accused has committed perjury at trial, a court may enhance the accused's sentence under § 3C1.1. Pp. 92-98.

(a) The parties agree, and the commentary to § 3C1.1 is explicit, that the phrase "impede or obstruct the administration of justice" includes perjury. Perjury is committed when a witness testifying under oath or affirmation gives false testimony concerning a material matter with the willful intent to provide false testimony. Because a defendant can testify at trial and be convicted, yet not have committed perjury—for example, the accused may give inaccurate testimony as a result of confusion, mistake, or faulty memory or give truthful testimony that a jury finds insufficient to excuse criminal liability or prove lack of intent—not every testifying defendant who is convicted qualifies for a § 3C1.1

enhancement. If a defendant objects to such an enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish that the defendant committed perjury. While a court should address each element of the alleged perjury in a clear and distinct finding, its enhancement decision is sufficient where, as here, it makes a determination of an obstruction or impediment of justice that encompasses all of the factual predicates for a perjury finding. Pp. 92–96.

(b) An enhanced sentence for the willful presentation of false testimony does not undermine the right to testify. The concern that a court will enhance a sentence as a matter of course whenever the accused takes the stand and is found guilty is dispelled by the requirement that a district court make findings to support all the elements of a perjury violation in a specific case. Any risk from a district court's incorrect perjury findings is inherent in a system which insists on the value of testimony under oath. A § 3C1.1 enhancement is also more than a mere surrogate for a separate and subsequent perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including retribution and incapacitation. The enhancement may not serve the additional goal of rehabilitation, which was the justification for enhancement in *Grayson*, but rehabilitation is not the only permissible justification for increasing a sentence based on perjury. Finally, the enhancement under § 3C1.1 is far from automatic—when contested, the elements of perjury must be found by the district court with specificity—and the fact that the enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds for its invalidation. Pp. 96–98.

944 F. 2d 178, reversed.

KENNEDY, J., delivered the opinion for a unanimous Court.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Mueller,* and *Deputy Solicitor General Bryson.*

Brent E. Beveridge argued the cause and filed a brief for respondent.

JUSTICE KENNEDY delivered the opinion of the Court.

The question presented is whether the Constitution permits a court to enhance a defendant's sentence under United

States Sentencing Commission, Guidelines Manual §3C1.1 (Nov. 1989), if the court finds the defendant committed perjury at trial. We answer in the affirmative.

I

Respondent, Sharon Dunnigan, was charged in a single count indictment with conspiracy to distribute cocaine in violation of 21 U. S. C. §846. After entering a plea of not guilty, she stood trial.

The case in chief for the United States consisted of five witnesses who took part in, or observed, respondent's cocaine trafficking during the summer of 1988. The first witness was Freddie Harris, a cocaine dealer in Charleston, West Virginia. Harris testified that respondent traveled between Charleston and Cleveland, Ohio, numerous times during the summer in question to purchase cocaine for him. He further stated that either he or his associate John Dean accompanied respondent on several of these trips. Dean was the second witness, and he recounted his trips to Cleveland with respondent during the same period to purchase cocaine. He also described meetings with both respondent and Harris for the purpose of delivering cocaine.

Three more Government witnesses followed. Andre Charlton testified that respondent, at her own apartment, delivered several ounces of cocaine to Charlton and Harris. Charlton also attested to receiving cocaine from Dean which Dean said he and respondent had bought in Cleveland. Tammy Moore testified next. She described conversations during which respondent vouched for the high quality of the cocaine in Cleveland and suggested Moore accompany her on a trip to Cleveland. Then came the testimony of Wynema Brown, who repeated respondent's admissions of trips to Cleveland to purchase cocaine for Harris. Brown also stated she saw cocaine powder at respondent's apartment and witnessed respondent and her daughter convert the powder into crack cocaine for the daughter to sell. This ended the Government's case in chief.

Respondent elected to take the stand and was the sole witness in her own defense. She denied all criminal acts attributed to her. She admitted going to Cleveland with Harris once but claimed it was for an innocent purpose, not to buy or sell cocaine. She admitted knowing John Dean but denied traveling with him to Cleveland. Last, she denied knowing that cocaine was brought into or sold from her apartment. On cross-examination, the Government questioned respondent regarding the testimony of the five prosecution witnesses. Respondent denied their inculpatory statements and said she had not possessed or distributed cocaine during the summer in question or at any other time. The Government also asked whether Edward Dickerson had been in her apartment or bought crack cocaine from her. Respondent answered no.

The defense rested, and the Government began its rebuttal with the testimony of Dickerson. He testified to purchasing crack cocaine from respondent on July 12, 1988, in a transaction monitored by law enforcement authorities. The Government also recalled Moore, who claimed respondent sold her crack cocaine about five times and provided cocaine powder to her and respondent's daughter to convert into crack cocaine for resale. According to Moore, the money from the resale was paid over to respondent. The jury returned a verdict of guilty.

Respondent was sentenced pursuant to the United States Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual (Nov. 1989). Her base offense level was set at 22, and the Government requested that the base be increased by two offense levels under USSG § 3C1.1, entitled "willfully obstructing or impeding proceedings," because respondent perjured herself at trial. After arguments from both sides, the District Court ruled on the request:

> "The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels." App. 29.

Based upon the enhanced offense level 24 and a criminal history category I, the District Court sentenced respondent to 51 months' incarceration, which was at the low end of the Guidelines range.

Respondent appealed her sentence, and the Court of Appeals reversed the District Court's decision to increase respondent's offense level under USSG §3C1.1. 944 F. 2d 178 (CA4 1991). The Court of Appeals did not take issue with the District Court's factual findings or rule that further findings were necessary to support a §3C1.1 enhancement. Instead, the court held that a §3C1.1 enhancement based on a defendant's alleged perjury at trial would be unconstitutional. The court reasoned that "every defendant who takes the stand and is convicted [would] be given the obstruction of justice enhancement." *Id.*, at 183. Citing some of the incentives for an accused to elect not to testify, including the risk of impeachment by prior convictions, the court ruled that a mechanical sentencing enhancement for testifying was unconstitutional: "With an automatic §3C1.1 enhancement added to the ante, the defendant may not think testifying worth the risk." *Id.*, at 184.

Referring to *United States* v. *Grayson*, 438 U. S. 41 (1978), where we upheld a sentence increase based on an accused's false testimony at trial, the Court of Appeals found that precedent distinguishable on two grounds. First, in *Grayson* we justified the sentence increase as based on the

District Court's assessment of the defendant's greater need for rehabilitation. *Id.*, at 51–53. The Court of Appeals thought this justification was inapplicable, viewing the § 3C1.1 enhancement as a punishment for obstructing justice without the time and expense of a separate perjury prosecution. 944 F. 2d, at 184. Second, the *Grayson* Court cautioned that "[n]othing we say today requires a sentencing judge to enhance, in some wooden or reflex fashion, the sentences of all defendants whose testimony is deemed false." 438 U. S., at 55. According to the Court of Appeals, "[t]he guidelines supply precisely the 'wooden or reflex' enhancement disclaimed by the Court," 944 F. 2d, at 184, and this rigidity "makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf," *id.*, at 185.

Over a dissent by four of its judges, the Court of Appeals declined to rehear the case en banc. 950 F. 2d 149 (CA4 1991). We granted certiorari. 504 U. S. 940 (1992).

II

A

Sentencing Guideline § 3C1.1 states in full: "If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the [defendant's] offense level by 2 levels." USSG § 3C1.1 (Nov. 1989). See also USSG § 3C1.1 (Nov. 1992). Both parties assume the phrase "impede or obstruct the administration of justice" includes perjury, and the commentary to § 3C1.1 is explicit in so providing. In pertinent part, the commentary states:

> "This section provides a sentence enhancement for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the dis-

> position of criminal charges, in respect to the instant offense.
>
> . . . . .
>
> "1. The following conduct, while not exclusive, may provide a basis for applying this adjustment:
>
> . . . . .
>
> "(c) testifying untruthfully or suborning untruthful testimony concerning a material fact, . . . during a preliminary or grand jury proceeding, trial, sentencing proceeding, or any other judicial proceeding." USSG §3C1.1, comment., n. 1(c) (Nov. 1989).

See also USSG §3C1.1, comment., n. 3(b) (Nov. 1992) ("The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies: . . . (b) committing, suborning, or attempting to suborn perjury").

Were we to have the question before us without reference to this commentary, we would have to acknowledge that some of our precedents do not interpret perjury to constitute an obstruction of justice unless the perjury is part of some greater design to interfere with judicial proceedings. *In re Michael,* 326 U. S. 224, 228 (1945); *Ex parte Hudgings,* 249 U. S. 378, 383 (1919). Those cases arose in the context of interpreting early versions of the federal criminal contempt statute, which defined contempt, in part, as "misbehavior of any person . . . as to obstruct the administration of justice." 28 U. S. C. §385 (1940 ed.) (Judicial Code §268), derived from the Act of Mar. 2, 1831, Rev. Stat. §725. See also 18 U. S. C. §401(1) (same).

In *Hudgings* and *Michael,* we indicated that the ordinary task of trial courts is to sift true from false testimony, so the problem caused by simple perjury was not so much an obstruction of justice as an expected part of its administration. See *Michael,* 326 U. S., at 227–228. Those cases, however, were decided against the background rule that the contempt power was to be confined to "'the least possible power adequate'" to protect "the administration of justice against immediate interruption of its business." *Id.*, at 227 (quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821)). In the present context, on the other hand, the enhancement provision is part of a sentencing scheme designed to determine the appropriate type and extent of punishment after the issue of guilt has been resolved. The commission of perjury is of obvious relevance in this regard, because it reflects on a defendant's criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general. Even on the assumption that we could construe a sentencing guideline in a manner inconsistent with its accompanying commentary, the fact that the meaning ascribed to the phrase "obstruction of justice" differs in the contempt and sentencing contexts would not be a reason for rejecting the Sentencing Commission's interpretation of that phrase. In all events, the Commission's interpretation is contested by neither party to this case.

In determining what constitutes perjury, we rely upon the definition that has gained general acceptance and common understanding under the federal criminal perjury statute, 18 U. S. C. § 1621. A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. See § 1621(1); *United States* v. *Debrow*, 346 U. S. 374, 376 (1953); *United States* v. *Norris*, 300 U. S. 564, 574, 576 (1937). This federal definition of perjury by a witness has remained unchanged in its material respects for over a century. See *United States* v. *Smull*, 236 U. S. 405, 408, and n. 1 (1915) (tracing history of § 1621's predecessor, Act of Mar. 4, 1909, ch. 321, § 125, 35 Stat. 1111). It parallels typical state-law definitions of perjury, see American Law Institute, Model Penal Code § 241.1 (1985); 4 C. Torcia, Wharton's Criminal Law § 601 (14th ed. 1981), and has roots in the law dating back to at least the Perjury Statute of 1563, 5 Eliz. I, ch. 9, see Gordon, The Invention of a Common Law

Crime: Perjury and the Elizabethan Courts, 24 Am. J. Legal Hist. 145 (1980). See also 1 Colonial Laws of New York, 1664–1719, ch. 8, pp. 129–130 (reprinting "An Act to prevent wilfull Perjury," enacted Nov. 1, 1683).

Of course, not every accused who testifies at trial and is convicted will incur an enhanced sentence under §3C1.1 for committing perjury. As we have just observed, an accused may give inaccurate testimony due to confusion, mistake, or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress, or self-defense. Her testimony may be truthful, but the jury may nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent. For these reasons, if a defendant objects to a sentence enhancement resulting from her trial testimony, a district court must review the evidence and make independent findings necessary to establish a willful impediment to, or obstruction of, justice, or an attempt to do the same, under the perjury definition we have set out. See USSG §6A1.3 (Nov. 1989); Fed. Rule Crim. Proc. 32(c)(3)(D). See also *Burns* v. *United States*, 501 U. S. 129, 134 (1991). When doing so, it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding. The district court's determination that enhancement is required is sufficient, however, if, as was the case here, the court makes a finding of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury. See App. 29 ("The court finds that *the defendant was untruthful at trial with respect to material matters* in this case. [B]y virtue of her failure to give truthful testimony on material matters *that were designed to substantially affect the outcome of the case,* the court concludes that the false testimony at trial warrants an upward adjustment by two levels" (emphasis added)). Given the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken, there is ample support for the District Court's finding.

B

We turn next to the contention that an enhanced sentence for the willful presentation of false testimony undermines the right to testify. The right to testify on one's own behalf in a criminal proceeding is made explicit by federal statute, 18 U. S. C. § 3481, and, we have said, it is also a right implicit in the Constitution, see *Rock* v. *Arkansas,* 483 U. S. 44, 51–53 (1987); *Nix* v. *Whiteside,* 475 U. S. 157, 164 (1986).

Respondent cannot contend that increasing her sentence because of her perjury interferes with her right to testify, for we have held on a number of occasions that a defendant's right to testify does not include a right to commit perjury. *Id.,* at 173; *United States* v. *Havens,* 446 U. S. 620, 626 (1980); *Grayson,* 438 U. S., at 54. Nor can respondent contend § 3C1.1 is unconstitutional on the simple basis that it distorts her decision whether to testify or remain silent. Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights. See *Bordenkircher* v. *Hayes,* 434 U. S. 357, 365 (1978); *McGautha* v. *California,* 402 U. S. 183, 216–217 (1971); *United States* v. *Knox,* 396 U. S. 77, 82–83 (1969).

No doubt to avoid these difficulties, respondent's argument comes to us in a different form. It is that § 3C1.1 carries a risk that a district court will order enhancement even when a defendant's testimony is truthful, either because the court acts without regard to the truth or makes an erroneous finding of falsity. That § 3C1.1 creates such a risk, respondent claims, makes the enhancement unconstitutional. This argument does not survive scrutiny.

The concern that courts will enhance sentences as a matter of course whenever the accused takes the stand and is found guilty is dispelled by our earlier explanation that if an accused challenges a sentence increase based on perjured testimony, the trial court must make findings to support all the elements of a perjury violation in the specific case. And as to the risk of incorrect findings of perjury by district courts, that risk is inherent in a system which insists on the value of testimony under oath. To uphold the integrity of our trial system, we have said that the constitutionality of perjury statutes is unquestioned. *Grayson, supra,* at 54. See also *Nix, supra,* at 173–174; *Havens, supra,* at 626–627. The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat. All testimony, from third-party witnesses and the accused, has greater value because of the witness' oath and the obligations or penalties attendant to it. Cf. G. Neilson, Trial By Combat 5 (1891) ("A means of ensuring the truth in human testimony has been a thing desired in every age").

Neither can we accept respondent's argument that the § 3C1.1 sentence enhancement advances only "the impermissible sentencing practice of incarcerating for the purpose of saving the Government the burden of bringing a separate and subsequent perjury prosecution." *Grayson, supra,* at 53. A sentence enhancement based on perjury does deter false testimony in much the same way as a separate prosecution for perjury. But the enhancement is more than a mere surrogate for a perjury prosecution. It furthers legitimate sentencing goals relating to the principal crime, including the goals of retribution and incapacitation. See 18 U. S. C. § 3553(a)(2); *Mistretta* v. *United States,* 488 U. S. 361, 367 (1989). It is rational for a sentencing authority to conclude that a defendant who commits a crime and then perjures herself in an unlawful attempt to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy the trial process. The perjuring defendant's willingness to frustrate judicial proceedings to avoid criminal liability suggests that the need for incapacitation and retribution is heightened as compared with the defendant charged with the same crime who allows judicial proceedings to progress without resorting to perjury.

Weighed against these considerations, the arguments made by the Court of Appeals to distinguish *Grayson* are wide of the mark. The court is correct that rehabilitation is no longer a goal of sentencing under the Guidelines. 28 U. S. C. § 994(k); *Mistretta, supra,* at 367. Our lengthy discussion in *Grayson* of how a defendant's perjury was relevant to the potential for rehabilitation, however, was not meant to imply that rehabilitation was the only permissible justification for an increased sentence based on perjury. As we have said, the § 3C1.1 enhancement serves other legitimate sentencing goals. Neither does our cautionary remark that the enhancement in *Grayson* need not be imposed "in some wooden or reflex fashion" compel invalidation of § 3C1.1, as the Court of Appeals believed. When contested, the elements of perjury must be found by the district court with the specificity we have stated, so the enhancement is far from automatic. And that the enhancement stems from a congressional mandate rather than from a court's discretionary judgment cannot be grounds, in these circumstances, for its invalidation. See *Chapman* v. *United States,* 500 U. S. 453, 467 (1991); *McMillan* v. *Pennsylvania,* 477 U. S. 79, 92 (1986).

Upon a proper determination that the accused has committed perjury at trial, an enhancement of sentence is required by the Sentencing Guidelines. That requirement is consistent with our precedents and is not in contravention of the privilege of an accused to testify in her own behalf. The judgment of the Court of Appeals is reversed.

It is so ordered.

NEGONSOTT *v.* SAMUELS, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 91–5397. Argued January 11, 1993—Decided February 24, 1993

Petitioner Negonsott, a member of the Kickapoo Tribe and a resident of the Kickapoo Reservation in Kansas, was convicted by a County District Court jury of aggravated battery for shooting another Indian on the reservation. The court set aside the conviction on the ground that the Federal Government had exclusive jurisdiction to prosecute Negonsott for the shooting under the Indian Major Crimes Act, 18 U. S. C. § 1153, which encompasses 13 enumerated felonies committed by "[a]ny Indian . . . against the person or property of another Indian or other person . . . within the Indian country." However, the State Supreme Court reinstated the conviction, holding that the Kansas Act, 18 U. S. C. § 3243, conferred on Kansas jurisdiction to prosecute all crimes committed by or against Indians on Indian reservations in the State. Subsequently, the Federal District Court dismissed Negonsott's petition for a writ of habeas corpus, and the Court of Appeals affirmed.

Held: The Kansas Act explicitly confers jurisdiction on Kansas over all offenses involving Indians on Indian reservations. Congress has plenary authority to alter the otherwise exclusive nature of federal jurisdiction under § 1153. Standing alone, the Kansas Act's first sentence—which confers jurisdiction on Kansas over "offenses committed by or against Indians on Indian reservations . . . to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State"—is an unambiguous grant of jurisdiction over both major and minor offenses. And the most logical meaning of the Act's second sentence—which provides that nothing in the Act shall "deprive" federal courts of their "jurisdiction over offenses defined by the laws of the United States"—is that federal courts shall retain their jurisdiction to try all offenses subject to federal jurisdiction, while Kansas courts shall have jurisdiction to try persons for the same conduct when it violates state law. This is the only reading of the Kansas Act that gives effect to every clause and word of the statute, and it is supported by the Act's legislative history. In contrast, if this Court were to accept Negonsott's argument that the second sentence renders federal jurisdiction exclusive whenever the underlying conduct is punishable under federal law, Kansas would be left with jurisdiction over only those minor offenses committed by one Indian against the person or property of another, a result that can hardly be reconciled with the first sentence's unqualified grant of jurisdiction. There is no need to resort to the canon of statutory construction that ambiguities should be resolved in favor of Indians, since the Kansas Act quite unambiguously confers jurisdiction on the State. Pp. 102–110.

933 F. 2d 818, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in all but Part II–B of which SCALIA and THOMAS, JJ., joined.

Pamela S. Thompson argued the cause and filed a brief for petitioner.

Robert T. Stephan, Attorney General of Kansas, argued the cause for respondents. With him on the brief were *John W. Campbell*, Deputy Attorney General, and *Timothy G. Madden*, Special Assistant Attorney General.

William K. Kelley argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General O'Meara, Edwin S. Kneedler*, and *Edward J. Shawaker*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.†

The question presented in this case is whether the Kansas Act, 18 U. S. C. §3243, confers jurisdiction on the State of Kansas to prosecute petitioner, a Kickapoo Indian, for the state-law offense of aggravated battery committed against another Indian on an Indian reservation. We hold that it does.

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*Briefs of *amici curiae* urging reversal were filed for the Devils Lake Sioux Tribe of the Fort Totten Indian Reservation et al. by *Bertram E. Hirsch;* and for the Iowa Tribe of Kansas and Nebraska et al. by *Melody L. McCoy*.

†JUSTICE SCALIA and JUSTICE THOMAS join all but Part II–B of this opinion.

I

Petitioner, Emery L. Negonsott, is a member of the Kickapoo Tribe and a resident of the Kickapoo Reservation in Brown County, Kansas. In March 1985, he was arrested by the county sheriff in connection with the shooting of another Indian on the Kickapoo Reservation. After a jury trial in the Brown County District Court, petitioner was found guilty of aggravated battery. Kan. Stat. Ann. § 21–3414 (1988). The District Court set the conviction aside, however, on the ground that the Federal Government had exclusive jurisdiction to prosecute petitioner for the shooting under the Indian Major Crimes Act, 18 U. S. C. § 1153. The Kansas Supreme Court reinstated petitioner's conviction, holding that the Kansas Act conferred jurisdiction on Kansas to prosecute "all crimes committed by or against Indians on Indian reservations located in Kansas." *State* v. *Nioce*, 239 Kan. 127, 131, 716 P. 2d 585, 588 (1986). On remand, the Brown County District Court sentenced petitioner to imprisonment for a term of 3 to 10 years.

Petitioner then filed a petition for a writ of habeas corpus under 28 U. S. C. § 2254, reasserting his claim that Kansas lacked jurisdiction to prosecute him for aggravated battery. The District Court dismissed his petition, 696 F. Supp. 561 (Kan. 1988), and the Court of Appeals for the Tenth Circuit affirmed, 933 F. 2d 818 (1991). The Court of Appeals found the language of the Kansas Act ambiguous as to "whether Congress intended to grant Kansas courts concurrent jurisdiction with federal courts over the crimes enumerated in the [Indian] Major Crimes Act, or whether by the second sentence of the Kansas Act Congress intended to retain exclusive jurisdiction in the federal courts over those specific crimes." *Id.*, at 820–821. After examining the Act's legislative history, however, the Court of Appeals resolved this ambiguity in favor of the first construction, and held that Kansas had jurisdiction to prosecute petitioner for aggravated battery. *Id.*, at 821–823. We granted certiorari to resolve a conflict between the Courts of Appeals, 505 U. S. 1218 (1992),[1] and now affirm.

II

Criminal jurisdiction over offenses committed in "Indian country," 18 U. S. C. § 1151, "is governed by a complex patchwork of federal, state, and tribal law." *Duro* v. *Reina*, 495 U. S. 676, 680, n. 1 (1990). The Indian Country Crimes Act, 18 U. S. C. § 1152, extends the general criminal laws of federal maritime and enclave jurisdiction to Indian country, except for those "offenses committed by one Indian against the person or property of another Indian." See F. Cohen, Handbook of Federal Indian Law 288 (1982 ed.). These latter offenses typically are subject to the jurisdiction of the concerned Indian tribe, unless they are among those enumerated in the Indian Major Crimes Act. Originally enacted in 1885, the Indian Major Crimes Act establishes federal jurisdiction over 13 enumerated felonies committed by "[a]ny Indian . . . against the person or property of another Indian or other person . . . within the Indian country." § 1153(a).[2] As

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[1] See *Youngbear* v. *Brewer*, 415 F. Supp. 807 (ND Iowa 1976), aff'd, 549 F. 2d 74 (CA8 1977). In *Youngbear*, the Court of Appeals for the Eighth Circuit upheld a lower court ruling that the State of Iowa lacked jurisdiction to prosecute the Indian defendant under a similarly worded statute conferring jurisdiction on Iowa over offenses committed by or against Indians on certain Indian reservations within the State, see Act of June 30, 1948, ch. 759, 62 Stat. 1161, for conduct punishable as an offense enumerated in the Indian Major Crimes Act, 18 U. S. C. § 1153.

[2] The Indian Major Crimes Act provides in full:

"(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject the text of § 1153, see n. 2, *supra,* and our prior cases make clear, federal jurisdiction over the offenses covered by the Indian Major Crimes Act is "exclusive" of state jurisdiction. See *United States* v. *John,* 437 U. S. 634, 651 (1978); *Seymour* v. *Superintendent of Washington State Penitentiary,* 368 U. S. 351, 359 (1962); *United States* v. *Kagama,* 118 U. S. 375, 384 (1886).

Congress has plenary authority to alter these jurisdictional guideposts, see *Washington* v. *Confederated Bands and Tribes of Yakima Nation,* 439 U. S. 463, 470–471 (1979), which it has exercised from time to time. This case concerns the first major grant of jurisdiction to a State over offenses involving Indians committed in Indian country, the Kansas Act, which provides in full:

> "Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.
>
> "This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations." Act of June 8, 1940, ch. 276, 54 Stat. 249 (codified at 18 U. S. C. § 3243).

Passed in 1940, the Kansas Act was followed in short order by virtually identical statutes granting to North Dakota and Iowa, respectively, jurisdiction to prosecute offenses com-

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to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

"(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense." 18 U. S. C. § 1153.

mitted by or against Indians on certain Indian reservations within their borders. See Act of May 31, 1946, ch. 279, 60 Stat. 229; Act of June 30, 1948, ch. 759, 62 Stat. 1161.

Kansas asserted jurisdiction to prosecute petitioner for aggravated battery under the Kansas Act. Petitioner challenges the State's jurisdiction in this regard. He contends that Congress added the second sentence of the Kansas Act to preserve the "exclusive" character of federal jurisdiction over the offenses enumerated in the Indian Major Crimes Act, and since the conduct resulting in his conviction for aggravated battery is punishable as at least two offenses listed in the Indian Major Crimes Act,[3] Kansas lacked jurisdiction to prosecute him in connection with the shooting incident. According to petitioner, the Kansas Act was intended to confer jurisdiction on Kansas only over misdemeanor offenses involving Indians on Indian reservations. To construe the statute otherwise, petitioner asserts, would effect an "implied repeal" of the Indian Major Crimes Act. Moreover, petitioner continues, the construction adopted by the Court of Appeals below is at odds with the legislative history of the Kansas Act as well as the canon that statutes are to be liberally construed in favor of Indians.

A

"Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 570 (1982) (internal quotation marks omitted). In analyzing petitioner's contentions, then, we begin with the text of the Kansas

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[3] The Indian Major Crimes Act does not explicitly refer to the offense of aggravated battery, but it lists "assault with a dangerous weapon" and "assault resulting in serious bodily injury." 18 U. S. C. § 1153(a). These offenses are defined at 18 U. S. C. §§ 113(c) and (f). We assume, for the sake of deciding this case, that the state-law offense for which petitioner was convicted, Kan. Stat. Ann. § 21–3414 (1988), is comparable to one or both of these federal offenses.

Act itself. The first sentence confers jurisdiction on "Kansas over offenses committed by or against Indians on Indian reservations . . . to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State." § 3243. Standing alone, this sentence unambiguously confers jurisdiction on Kansas to prosecute all offenses—major and minor—committed by or against Indians on Indian reservations in accordance with state law. Petitioner does not assert otherwise. Instead, he rests his case on the second sentence of the Kansas Act, which states that nothing in the Act shall "deprive" federal courts of their "jurisdiction over offenses defined by the laws of the United States." *Ibid.* But the most logical meaning of this proviso, we believe, is that federal courts shall retain their jurisdiction to try all offenses subject to federal jurisdiction under 18 U. S. C. §§ 1152 and 1153, while Kansas courts shall have jurisdiction to try persons for the same conduct when it violates state law.

This interpretation is quite consistent with the first sentence's conferral of jurisdiction on Kansas over all offenses committed by or against Indians on Indian reservations in accordance with state law. The Court of Appeals referred to this state of affairs in terms of Kansas courts having "concurrent jurisdiction" with federal courts over the offenses enumerated in the Indian Major Crimes Act. See 933 F. 2d, at 820–821. But the Kansas Act does not confer jurisdiction on Kansas to prosecute individuals for the federal offenses listed in the Indian Major Crimes Act; it confers jurisdiction to prosecute individuals in accordance with state law for conduct that is also punishable under federal law pursuant to the Indian Major Crimes Act. Strictly speaking, then, federal courts retain their exclusive jurisdiction to try individuals for offenses covered by the Indian Major Crimes Act, and in this sense, the Kansas Act in fact confers only concurrent "legislative" jurisdiction on the State to define and prosecute similar offenses.

Our reading of the Kansas Act is the only one that gives effect "to every clause and word of [the] statute." *Moskal* v. *United States*, 498 U. S. 103, 109–110 (1990) (internal quotation marks omitted). Petitioner's construction of the Act's second sentence renders federal jurisdiction exclusive whenever the underlying conduct is punishable under federal law pursuant to either 18 U. S. C. §§ 1152 or 1153. Kansas is left, then, with jurisdiction over only those minor offenses committed by one Indian against the person or property of another. This result can hardly be reconciled with the first sentence's unqualified grant of jurisdiction to Kansas to prosecute all state-law offenses committed by or against Indians on Indian reservations. Moreover, contrary to the assertion of petitioner, our construction of the Kansas Act does not work an "implied repeal" of the Indian Major Crimes Act. As we have noted, federal courts retain their exclusive jurisdiction to try individuals for major federal crimes committed by or against Indians in Indian country. In any event, to the extent that the Kansas Act altered the jurisdictional landscape, the alteration is not merely by implication: The Act explicitly conferred jurisdiction on Kansas over all offenses involving Indians on Indian reservations.

B

Although we think resort to secondary materials is unnecessary to decide this case, the legislative history of the Kansas Act supports our construction. Both the House and Senate Reports accompanying the Act consist almost entirely of a letter and memorandum from Acting Secretary of the Interior, E. K. Burlew, to the Chairmen of the House and Senate Indian Affairs Committees, which provide a background account of the forces leading to the enactment of the Kansas Act. See H. R. Rep. No. 1999, 76th Cong., 3d Sess. (1940) (hereinafter H. R. Rep.); S. Rep. No. 1523, 76th Cong., 3d Sess. (1940) (hereinafter S. Rep.). According to Acting Secretary Burlew, in practice, Kansas had exercised jurisdiction over all offenses committed on Indian reservations involving

Indians, "even where the criminal act charged constituted one of the major offenses listed in [the Indian Major Crimes Act]," because such offenses were otherwise left unenforced by the concerned tribes (who were without tribal courts). H. R. Rep., at 4; S. Rep., at 3. The Indian tribes of Kansas did not object to this scheme, but welcomed it. When the authority of the Kansas courts to entertain such prosecutions was called into question, the tribes "expressed a wish that the jurisdiction hitherto exercised by the State courts be continued." H. R. Rep., at 4; S. Rep., at 4. Thus, the Kansas Act was designed to "merely confirm a relationship which the State has willingly assumed, which the Indians have willingly accepted, and which has produced successful results, over a considerable period of years." H. R. Rep., at 5; S. Rep., at 5.[4]

Since Kansas had exercised jurisdiction over offenses covered by the Indian Major Crimes Act, and the Kansas Act was enacted to ratify the existing scheme of *de facto* state jurisdiction over all offenses committed on Indian reservations, it follows that Congress did not intend to retain exclusive federal jurisdiction over the prosecution of major crimes. In view of the experimental nature of the Kansas Act, Congress simply intended to retain jurisdiction over offenses already subject to federal jurisdiction under 18 U. S. C. §§1152 and 1153 in the event that the Kansas Act did not solve the identified enforcement problem (*i. e.*, in case the State declined to exercise its jurisdiction). This explanation squares with Acting Secretary Burlew's conclusion that, although the Kansas Act's "proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as those which are not," "[t]he prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable." H. R. Rep., at 5; S. Rep., at 4.

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[4] *Amici* Iowa Tribe of Kansas and Nebraska et al. allege that at least one tribe, the Potawatomi Indian Tribe, opposed the Kansas Act. Brief for Iowa Tribe of Kansas and Nebraska et al. as *Amici Curiae* 17. According to *amici*, the Tribe sent a telegram to the Chairman of the House Committee on Indian Affairs, Representative W. Rogers, voicing its opposition to the Act, which was followed by an exchange of several letters. See *id.*, at 17–18. This correspondence is not contained in the reprinted legislative history of the Act, but instead rests in the National Archives. Although one of Chairman Rogers' letters to the Tribe states: "'Your letters are being filed with the House Committee on Indian Affairs,'" *id.*, at 17 (quoting letter of May 10, 1939), we have no way of knowing to what extent, if at all, the Tribe's opposition to the Kansas Act was brought to the attention of other Members of Congress. Therefore, we regard the background account set forth in the House and Senate Reports as conclusive for purposes of discerning Congress' understanding of the forces leading to the introduction of the bill which became the Kansas Act.

Petitioner argues that Congress' amendments to the original version of the bill which became the Kansas Act confirm that it did not intend to confer jurisdiction on Kansas over conduct covered by the Indian Major Crimes Act. As originally drafted, the bill provided "[t]hat concurrent jurisdiction is hereby relinquished to the State of Kansas to prosecute Indians and others for offenses by or against Indians or others, committed on Indian reservations in Kansas," and explicitly stated that the Indian Major Crimes Act as well as other statutes granting federal jurisdiction over offenses committed in Indian country "are modified accordingly." 86 Cong. Rec. 5596 (1940). Congress eventually deleted the original bill's reference to "*concurrent* jurisdiction" as well as its reference to the effect of the bill on the Indian Major Crimes Act. Rather than supporting petitioner's construction of the Kansas Act, however, we think these amendments are in accord with our reading of the statute.

The amendments to the original bill were proposed by Acting Secretary Burlew in his letter and memorandum to the committee chairmen in order to reflect more accurately the "legal situation as it now exists or as intended to be created." H. R. Rep., at 3; S. Rep., at 2. He explained:

> "The bill proposes to relinquish concurrent jurisdiction to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal Government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State complete criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law." *Ibid.*

Thus, the original bill was amended to make clear that the statute conferred jurisdiction on Kansas over more offenses than were subject to federal jurisdiction under existing federal law, and not, as petitioner suggests, to narrow the category of offenses subject to prosecution in state court to minor offenses excluded from federal jurisdiction under 18 U. S. C. § 1152.

There is no explanation in the legislative history why Congress deleted the original bill's reference to the effect of the statute on the Indian Major Crimes Act and adopted the general language of the second sentence of § 3243 in its place. But we think it is likely that Congress simply thought it preferable to refer generally to the fact that the Act did not "deprive" federal courts of their jurisdiction over offenses defined by federal law, rather than to list the specific statutes pursuant to which the Federal Government had exercised jurisdiction to prosecute offenses committed by or against Indians in Indian country. In any event, to the extent one may draw a negative inference from Congress' decision to delete the specific reference to the effect of the Kansas Act on the Indian Major Crimes Act, we think this is too slender a reed upon which to rest departure from the clear import of the text of the Kansas Act.

C

Finally, we find petitioner's resort to general principles of Indian law unavailing. Petitioner cites our opinion in *Bryan* v. *Itasca County,* 426 U. S. 373 (1976), for the proposition that "laws must be liberally construed to favor Indians." Brief for Petitioner 11. What we actually said in *Bryan,* was that "'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'" 426 U. S., at 392 (quoting *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89 (1918)). Petitioner claims that the Court of Appeals' construction of the Kansas Act harms Indians by eliminating the historically exclusive stewardship of the Federal Government over major crimes committed by Indians in Indian country, and subjecting Indians to the possibility of dual prosecution by state and federal authorities.

It is not entirely clear to us that the Kansas Act is a statute "passed for the benefit of dependent Indian tribes." But if it does fall into that category, it seems likely that Congress thought that the Act's conferral of criminal jurisdiction on the State would be a "benefit" to the tribes in question. We see no reason to equate "benefit of dependent Indian tribes," as that language is used in *Bryan,* with "benefit of accused Indian criminals," without regard to the interests of the victims of these crimes or of the tribe itself. But in any event, for the reasons previously discussed, we think that the Kansas Act quite unambiguously confers jurisdiction on the State over major offenses committed by or against Indians on Indian reservations, and we therefore have no occasion to resort to this canon of statutory construction. See *South Carolina* v. *Catawba Indian Tribe, Inc.,* 476 U. S. 498, 506 (1986).

The judgment of the Court of Appeals is

Affirmed.

UNITED STATES *v.* A PARCEL OF LAND, BUILDINGS, APPURTENANCES, AND IMPROVEMENTS, KNOWN AS 92 BUENA VISTA AVENUE, RUMSON, NEW JERSEY, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91–781. Argued October 13, 1992—Decided February 24, 1993

The Government filed an *in rem* action against the parcel of land on which respondent's home is located, alleging that she had purchased the property with funds given her by Joseph Brenna that were "the proceeds traceable" to illegal drug trafficking, and that the property was therefore subject to seizure and forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U. S. C. § 881(a)(6). The District Court ruled, among other things, that respondent, who claims that she had no knowledge of the origins of the funds used to buy her house, could not invoke the "innocent owner" defense in § 881(a)(6), which provides that "no property shall be forfeited . . . , to the extent of the interest of an owner, by reason of any act . . . established by that owner to have been committed . . . without the knowledge or consent of that owner." The Court of Appeals remanded on interlocutory appeal, rejecting the District Court's reasoning that the innocent owner defense may be invoked only by persons who are bona fide purchasers for value and by those who acquired their property interests before the acts giving rise to the forfeiture took place.

Held: The judgment is affirmed.

937 F. 2d 98, affirmed.

JUSTICE STEVENS, joined by JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SOUTER, concluded that an owner's lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding under the statute. Pp. 118–131.

(a) The task of construing the statute must be approached with caution. Although customs, piracy, and revenue laws have long provided for the official seizure and forfeiture of tangible property used in the commission of criminal activity, the statute marked an important expansion of governmental power by authorizing the forfeiture of proceeds from the sale of illegal goods and by creating an express and novel protection for innocent owners. Pp. 118–123.

(b) The statute's use of the unqualified term "owner" in three places is sufficiently unambiguous to foreclose any contention that the protection afforded to innocent owners is limited to bona fide purchasers. That the funds respondent used to purchase her home were a gift does not, therefore, disqualify her from claiming that she is such an owner. P. 123.

(c) Contrary to the Government's contention, the statute did not vest ownership in the United States at the moment when the proceeds of the illegal drug transaction were used to pay the purchase price of the property at issue, thereby preventing respondent from ever becoming an "owner." Neither of the "relation back" doctrines relied on by the Government—the doctrine embodied in § 881(h), which provides that "[a]ll right, title and interest in property described in subsection (a) . . . shall vest in the United States upon commission of the act giving rise to forfeiture under this section," or the common-law doctrine, under which a forfeiture decree effectively vests title to the offending res in the Government as of the date of the offending conduct—makes the Government an owner of property before forfeiture has been decreed. Assuming that the common-law doctrine applies, it is clear that the fictional and retroactive vesting of title thereunder is not self-executing, but occurs only when the Government wins a judgment of forfeiture. Until then, someone else owns the property and may invoke any available defense, including the assertion that she is an innocent owner. A reading of § 881(h) demonstrates that it did not dispense with, but merely codified, the common-law doctrine and leads to the same result. The legislative history reveals that § 881(h) applies only to property that is subject to civil forfeiture under § 881(a). Although proceeds traceable to illegal drug transactions are, in § 881(h)'s words, "property described in subsection" (a)(6), the latter subsection exempts from civil forfeiture proceeds owned by one unaware of their criminal source and therefore must allow an assertion of the innocent owner defense *before* § 881(h) applies. Pp. 123–129.

(d) This Court need not resolve, *inter alia*, the parties' dispute as to the point at which guilty knowledge of the tainted character of property will deprive a party of an innocent owner defense, because respondent has assumed the burden of convincing the trier of fact that she had no knowledge of the alleged source of Brenna's gift when she received it. Pp. 129–131.

JUSTICE SCALIA, joined by JUSTICE THOMAS, concluded:

1. While it is true that § 881(a)(6)'s "innocent owner" exception produces the same result as would an "innocent owner" exception to traditional common-law forfeiture (with its relation-back principle), that conclusion cannot be based upon the plurality's implausible reading of the

phrase "property described in subsection (a)." Rather, the result reached in this case is correct because § 881(h) is best read as an expression of the traditional relation-back doctrine, which is a doctrine of *retroactive* vesting of title that takes effect only upon entry of the judicial order of forfeiture or condemnation. Under the alternative reading—that § 881(h) provides for immediate, undecreed, secret vesting of title in the United States at the time of the illegal transaction—either the plain language of § 881(a)(6)'s innocent-owner provision must be slighted or the provision must be deprived of all effect. Additionally, the traditional relation-back principle is the only interpretation of § 881(h) that makes sense within the structure of the applicable customs forfeiture procedures, under which the Government does not gain title until there is a forfeiture decree, and provides the only explanation for the textual distinction between § 881(a)(6)'s innocent "owner" and § 853's innocent "transferee" provisions. Pp. 131–138.

2. There is no proper basis for the plurality's conclusion that respondent has assumed the burden of proving that she had no knowledge of the alleged source of Brenna's gift when she received it, as opposed to when the illegal acts giving rise to forfeiture occurred. The issue of what is the relevant time for purposes of determining lack of knowledge is not fairly included in the question on which the Court granted certiorari, and the Court need not resolve it. Pp. 138–139.

STEVENS, J., announced the judgment of the Court and delivered an opinion, in which BLACKMUN, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 131. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE, J., joined, *post*, p. 139.

Amy L. Wax argued the cause for the United States. With her on the briefs were *Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Roberts,* and *David T. Shelledy.*

James A. Plaisted argued the cause for the respondents. With him on the briefs was *Shalom D. Stone.**

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*Briefs of *amici curiae* urging affirmance were filed for the American Bankers Association by *John J. Gill III* and *Michael F. Crotty;* for the American Land Title Association et al. by *David F. B. Smith;* and for the Federal Home Loan Mortgage Corp. by *Diane Marshall Ennist.*

Robert A. Ginsburg and *Thomas W. Logue* filed a brief for the Dade County Tax Collector et al. as *amici curiae.*

JUSTICE STEVENS announced the judgment of the Court and delivered an opinion, in which JUSTICE BLACKMUN, JUSTICE O'CONNOR, and JUSTICE SOUTER join.

The question presented is whether an owner's lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding under the Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(a), 84 Stat. 1276, as amended, 21 U. S. C. § 881(a)(6).[1]

I

On April 3, 1989, the Government filed an *in rem* action against the parcel of land in Rumson, New Jersey, on which respondent's home is located. The verified complaint alleged that the property had been purchased in 1982 by respondent with funds provided by Joseph Brenna that were "the proceeds traceable to an [unlawful] exchange for a controlled substance," App. 13, and that the property was therefore subject to seizure and forfeiture under § 881(a)(6), *id.*, at 15.[2]

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[1] The statute provides:

"The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . . .

"(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of [21 U. S. C. §§ 801–904], all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

[2] See n. 1, *supra.* The complaint also alleged that the property had been used in 1986 to facilitate the distribution of proceeds of an illegal

On April 12, 1989, in an *ex parte* proceeding, the District Court determined that there was probable cause to believe the premises were subject to forfeiture, and issued a summons and warrant for arrest authorizing the United States marshal to take possession of the premises. Respondent thereafter asserted a claim to the property, was granted the right to defend the action,[3] and filed a motion for summary judgment.

During pretrial proceedings, the following facts were established. In 1982, Joseph Brenna gave respondent approximately $240,000 to purchase the home that she and her three children have occupied ever since. Respondent is the sole owner of the property. From 1981 until their separation in 1987, she maintained an intimate personal relationship with Brenna. There is probable cause to believe that the funds used to buy the house were proceeds of illegal drug trafficking, but respondent swears that she had no knowledge of its origins.

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drug transaction, and was therefore subject to forfeiture pursuant to § 881(a)(7), which provides:

"The following shall be subject to forfeiture to the United States and no property right shall exist in them:

. . . . .

"(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

No issue concerning the Government's claim under subparagraph (7) is presented before us.

[3] The United States Marshals Service entered into an agreement with respondent that allows her to remain in possession of the property pending the outcome of the litigation.

Among the grounds advanced in support of her motion for summary judgment was the claim that she was an innocent owner under § 881(a)(6). The District Court rejected this defense for two reasons: First, it ruled that "the innocent owner defense may only be invoked by those who can demonstrate that they are bona fide *purchasers for value*" (emphasis in original);[4] second, the court read the statute to offer the innocent owner defense only to persons who acquired an interest in the property before the acts giving rise to the forfeiture took place.[5]

Respondent was allowed to take an interlocutory appeal pursuant to 28 U. S. C. § 1292(b). One of the controlling questions of law presented to the Court of Appeals was:

> "Whether an innocent owner defense may be asserted by a person who is not a bona fide purchaser for value concerning a parcel of land where the government has established probable cause to believe that the parcel of land was purchased with monies traceable to drug proceeds." 742 F. Supp. 189, 192 (NJ 1990).

Answering that question in the affirmative, the Court of Appeals remanded the case to the District Court to determine whether respondent was, in fact, an innocent owner.

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[4] "I find that the claimant cannot successfully invoke the 'innocent owner' defense here, because she admits that she received the proceeds to purchase the premises as a *gift* from Mr. Brenna. More particularly, I find that where, as here, the government has demonstrated probable cause to believe that property is traceable to proceeds from drug transactions, the innocent owner defense may only be invoked by those who can demonstrate that they are bona fide *purchasers for value.*" 738 F. Supp. 854, 860 (NJ 1990).

[5] "In particular, the 'innocent owner defense' at issue provides that 'no property shall be forfeited . . . to the extent of the interest of *an owner*, by reason of any act or omission . . . committed or omitted without the knowledge or consent of *that owner.*' 21 U. S. C. § 881(a)(6) (emphasis supplied). This language implies that the acts or omissions giving rise to forfeiture must be committed *after* the third party acquires a legitimate ownership interest in the property." *Ibid.* (emphasis in original).

The Court of Appeals refused to limit the innocent owner defense to bona fide purchasers for value because the plain language of the statute contains no such limitation,[6] because it read the legislative history as indicating that the term "owner" should be broadly construed,[7] and because the difference between the text of § 881(a)(6) and the text of the criminal forfeiture statute evidenced congressional intent not to restrict the civil section in the same way.[8]

The Court of Appeals also rejected the argument that respondent could not be an innocent owner unless she acquired the property before the drug transaction occurred. In advancing that argument the Government had relied on the "relation back" doctrine embodied in § 881(h), which provides that "[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." The court held that the relation back doctrine applied only to "property described in subsection (a)" and that the property at issue would not fit that description if respondent could establish her innocent owner defense. The court concluded that the Government's interpretation of § 881(h) "would essentially serve to emasculate the innocent owner defense provided for in section 881(a)(6). No one obtaining property after the occurrence of the drug transaction—including a bona fide purchase for value—would be eligible to offer an innocent owner defense on his behalf." 937 F. 2d 98, 102 (CA3 1991).

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[6] "Despite the appeal of this analysis, the plain language of the innocent owner provision speaks only in terms of an 'owner' and in no way limits the term 'owner' to a bona fide purchaser for value." 937 F. 2d 98, 101 (CA3 1991).

[7] "Furthermore, in *United States* v. *Parcel of Real Property Known as 6109 Grubb Road*, 886 F. 2d 618 (3d Cir. 1989), we determined, after reviewing the legislative history of section 881(a)(6), that 'the term "owner" should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized.' *Id.* at 625 n. 4 (quoting 1978 U. S. Code Cong. & Admin. News at 9522–23)." *Id.*, at 101–102.

[8] "Moreover, as the district court pointed out, the criminal forfeiture statute, section 853, is explicitly limited to bona fide purchasers for value, while in section 881 Congress omitted such limiting language. We believe that such a difference was intended by Congress." *Ibid.*

The conflict between the decision of the Court of Appeals and decisions of the Fourth and Tenth Circuits, see *In re One 1985 Nissan,* 889 F. 2d 1317 (CA4 1989); *Eggleston* v. *Colorado,* 873 F. 2d 242, 245–248 (CA10 1989), led us to grant certiorari, 503 U. S. 905 (1992). We now affirm.

II

Laws providing for the official seizure and forfeiture of tangible property used in criminal activity have played an important role in the history of our country. Colonial courts regularly exercised jurisdiction to enforce English and local statutes authorizing the seizure of ships and goods used in violation of customs and revenue laws.[9] Indeed, the misuse of the hated general warrant is often cited as an important cause of the American Revolution.[10]

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[9] "Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes. Like the Exchequer, in cases of seizure on navigable waters they exercised a jurisdiction concurrently with the courts of admiralty. But the vice-admiralty courts in the Colonies did not begin to function with any real continuity until about 1700 or shortly afterward. See Andrews, Vice-Admiralty Courts in the Colonies, in Records of the Vice-Admiralty Court of Rhode Island, 1617–1752 (ed. Towle, 1936), p. 1; Andrews, The Colonial Period of American History, vol. 4, ch. 8; Harper, The English Navigation Laws, ch. 15; Osgood, the American Colonies in the 18th Century, vol. 1, pp. 185–222, 299–303. By that time, the jurisdiction of common law courts to condemn ships and cargoes for violation of the Navigation Acts had been firmly established, apparently without question, and was regularly exercised throughout the colonies. In general the suits were brought against the vessel or article to be condemned, were tried by jury, closely followed the procedure in Exchequer, and if successful resulted in judgments of forfeiture or condemnation with a provision for

The First Congress enacted legislation authorizing the seizure and forfeiture of ships and cargos involved in customs offenses.[11] Other statutes authorized the seizure of ships engaged in piracy.[12] When a ship was engaged in acts of "piratical aggression," it was subject to confiscation notwithstanding the innocence of the owner of the vessel.[13]

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sale." *C. J. Hendry Co.* v. *Moore,* 318 U. S. 133, 139–140 (1943) (footnotes omitted).

[10] Writing for the Court in *Stanford* v. *Texas,* 379 U. S. 476, 481–482 (1965), Justice Stewart explained: "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."' *Boyd* v. *United States,* 116 U. S. 616, 625."

[11] See, *e. g.,* §§12, 36, 1 Stat. 39, 47; §§13, 14, 22, 27, 67, 1 Stat. 157–159, 161, 163–164, 176.

[12] See *The Palmyra,* 12 Wheat. 1, 8 (1827).

[13] "The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of Congress. Here, again, it may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression, &c., shall have been first attempted or made shall be

Later statutes involved the seizure and forfeiture of distilleries and other property used to defraud the United States of tax revenues from the sale of alcoholic beverages. See, *e. g., United States* v. *Stowell,* 133 U. S. 1, 11–12 (1890). In these cases, as in the piracy cases, the innocence of the owner of premises leased to a distiller would not defeat a decree of condemnation based on the fraudulent conduct of the lessee.[14]

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condemned. Nor is there any thing new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." *Harmony* v. *United States,* 2 How. 210, 233–234 (1844).

[14] "Beyond controversy, the title of the premises and property was in the claimant; and it is equally certain that he leased the same to the lessee for the purposes of a distillery, and with the knowledge that the lessee intended to use the premises to carry on that business, and that he did use the same for that purpose.

"Fraud is not imputed to the owner of the premises; but the evidence and the verdict of the jury warrant the conclusion that the frauds charged in the information were satisfactorily proved, from which it follows that the decree of condemnation is correct, if it be true, as heretofore explained, that it was the property and not the claimant that was put to trial under the pleadings; and we are also of the opinion that the theory adopted by the court below, that, if the lessee of the premises and the operator of the distillery committed the alleged frauds, the government was entitled to a verdict, even though the jury were of the opinion that the claimant was ignorant of the fraudulent acts or omissions of the distiller." *Dobbins's Distillery* v. *United States,* 96 U. S. 395, 403–404 (1878).

In all of these early cases the Government's right to take possession of property stemmed from the misuse of the property itself. Indeed, until our decision in *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294 (1967), the Government had power to seize only property that "'the private citizen was not permitted to possess.'"[15] The holding in that case that the Fourth Amendment did not prohibit the seizure of "mere evidence" marked an important expansion of governmental power. See *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 577–580 (1978) (STEVENS, J., dissenting).

The decision by Congress in 1978 to amend the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, to authorize the seizure and forfeiture of proceeds of illegal drug transactions, see 92 Stat. 3777, also marked an important expansion of governmental power.[16] Before that amendment, the statute had authorized forfeiture of only the illegal substances themselves and the instruments by which they were manufactured and distributed.[17] The original forfeiture provisions of the 1970 statute had closely paralleled the early statutes used to enforce the customs laws, the piracy laws, and the revenue laws: They generally authorized the forfeiture of property used in the commission of criminal activity, and they contained no innocent owner defense. They applied to stolen goods, but they did not apply to proceeds from the sale of stolen goods. Because the statute, after its 1978 amendment, does authorize the forfeiture of such proceeds and also contains an express and novel protection for innocent owners, we approach the task of construing it with caution.

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[15] "Thus stolen property—the fruits of crime—was always subject to seizure. And the power to search for stolen property was gradually extended to cover 'any property which the private citizen was not permitted to possess,' which included instrumentalities of crime (because of the early notion that items used in crime were forfeited to the State) and contraband. Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Calif. L. Rev. 474, 475. No separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted. The remedial structure also reflected these dual premises. Trespass, replevin, and the other means of redress for persons aggrieved by searches and seizures, depended upon proof of a superior property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized." *Warden* v. *Hayden*, 387 U. S., at 303–304.

[16] A precedent for this expansion had been established in 1970 by the Racketeer Influenced and Corrupt Organizations Act (RICO), see 18 U. S. C. § 1963(a). Even RICO, however, did not specifically provide for the forfeiture of "proceeds" until 1984, when Congress added § 1963(a)(3) to resolve any doubt whether it intended the statute to reach so far. See S. Rep. No. 98–225, pp. 191–200 (1983); *Russello* v. *United States*, 464 U. S. 16 (1983).

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[17] Section 511(a) of the 1970 Act, 84 Stat. 1276, provided:

"The following shall be subject to forfeiture to the United States and no property right shall exist in them:

"(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

"(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.

"(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

"(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

"(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III; and

"(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

"(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title."

III

The Court of Appeals correctly concluded that the protection afforded to innocent owners is not limited to bona fide purchasers. The text of the statute is the strongest support for this conclusion. The statute authorizes the forfeiture of moneys exchanged for a controlled substance, and "all proceeds traceable to such an exchange," with one unequivocal exception:

> "[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U. S. C. § 881(a)(6).

The term "owner" is used three times and each time it is unqualified. Such language is sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers. Presumably that explains why the Government does not now challenge this aspect of the Court of Appeals' ruling.

That the funds respondent used to purchase her home were a gift does not, therefore, disqualify respondent from claiming that she is an owner who had no knowledge of the alleged fact that those funds were "proceeds traceable" to illegal sales of controlled substances. Under the terms of the statute, her status would be precisely the same if, instead of having received a gift of $240,000 from Brenna, she had sold him a house for that price and used the proceeds to buy the property at issue.

IV

Although the Government does not challenge our interpretation of the statutory term "owner," it insists that respondent is not the "owner" of a house she bought in 1982 and has lived in ever since. Indeed, it contends that she never has been the owner of this parcel of land because the statute vested ownership in the United States at the moment when the proceeds of an illegal drug transaction were used to pay the purchase price. In support of its position, the Government relies on both the text of the 1984 amendment to the statute and the common-law relation back doctrine. We conclude, however, that neither the amendment nor the common-law rule makes the Government an owner of property before forfeiture has been decreed.

In analyzing the Government's relation back argument, it is important to remember that respondent invokes the innocent owner defense against a claim that *proceeds* traceable to an illegal transaction are forfeitable. The Government contends that the money that Brenna received in exchange for narcotics became Government property at the moment Brenna received it and that respondent's house became Government property when that tainted money was used in its purchase. Because neither the money nor the house could have constituted forfeitable proceeds until after an illegal transaction occurred, the Government's submission would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited. It seems unlikely that Congress would create a meaningless defense. Moreover, considering that a logical application of the Government's submission would result in the forfeiture of property innocently acquired by persons who had been paid with illegal proceeds for providing goods or services to drug traffickers,[18] the burden of persuading us that Congress intended such an inequitable result is especially heavy.

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[18] At oral argument the Government suggested that a narrow interpretation of the word "proceeds" would "probably" prevent this absurdity. See Tr. of Oral Arg. 27. The Government's brief, however, took the unequivocal position that the statute withholds the innocent owner defense from anyone who acquires proceeds after the illegal transaction took place. See Brief for United States 10, 21, 25, 27.

The Government recognizes that the 1984 amendment did not go into effect until two years after respondent acquired the property at issue in this case. It therefore relies heavily on the common-law relation back doctrine applied to *in rem* forfeitures. That doctrine applied the fiction that property used in violation of law was itself the wrongdoer that must be held to account for the harms it had caused.[19] Because the property, or "res," was treated as the wrongdoer, it was appropriate to regard it as the actual party to the *in rem* forfeiture proceeding. Under the relation back doctrine, a decree of forfeiture had the effect of vesting title to the offending res in the Government as of the date of its offending conduct. Because we are not aware of any common-law precedent for treating proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture, it is not entirely clear that the common-law relation back doctrine is applicable. Assuming that the doctrine does apply, however, it is nevertheless clear that under the common-law rule the fictional and retroactive vesting was not self-executing.

Chief Justice Marshall explained that forfeiture does not automatically vest title to property in the Government:

> "It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offence." *United States* v. *Grundy*, 3 Cranch 337, 350–351 (1806).[20]

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[19] See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 680–684 (1974).

[20] In his dissent, JUSTICE KENNEDY advocates the adoption of a new common-law rule that would avoid the need to construe the terms of the statute that created the Government's right to forfeit proceeds of drug transactions. Under his suggested self-executing rule, patterned after an amalgam of the law of trusts and the law of secured transactions, the Government would be treated as the owner of a secured or beneficial interest in forfeitable proceeds even before a decree of forfeiture is entered. The various authorities that he cites support the proposition that *if* such

The same rule applied when a statute (a statute that contained no specific relation back provision) authorized the forfeiture. In a passage to which the Government has referred us,[21] we stated our understanding of how the Government's title to forfeited property relates back to the moment of forfeitability:

> "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation;* the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and

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an interest exists, it may be extinguished by a sale to a bona fide purchaser; they provide no support for the assumption that such an interest springs into existence independently. As a matter of common law, his proposal is inconsistent with Chief Justice Marshall's statement that "nothing vests in the government until some legal step shall be taken," and with the cases cited by JUSTICE SCALIA, *post,* at 132. As a matter of statutory law, it is improper to rely on § 881(a) as the source of the Government's interest in proceeds without also giving effect to the statutory language defining the scope of that interest. That a statutory provision contains "puzzling" language, or seems unwise, is not an appropriate reason for simply ignoring its text.

JUSTICE KENNEDY's dramatic suggestion that our construction of the 1984 amendment "rips out," *post,* at 145, the "centerpiece of the Nation's drug enforcement laws," *post,* at 144, rests on what he characterizes as the "safe" assumption that the innocent owner defense would be available to "an associate" of a criminal who could "shelter the proceeds from forfeiture, to be reacquired once he is clear from law enforcement authorities," *ibid.* As a matter of fact, forfeitable proceeds are much more likely to be possessed by drug dealers themselves than by transferees sufficiently remote to qualify as innocent owners; as a matter of law, it is quite clear that neither an "associate" in the criminal enterprise nor a temporary custodian of drug proceeds would qualify as an innocent owner; indeed, neither would a sham bona fide purchaser.

[21] See Pet. for Cert. 9–10; Brief for United States 17.

> the condemnation, *when obtained*, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." *United States* v. *Stowell*, 133 U. S., at 16–17 (emphases added).

If the Government wins a judgment of forfeiture under the common-law rule—which applied to common-law forfeitures and to forfeitures under statutes without specific relation back provisions—the vesting of its title in the property relates back to the moment when the property became forfeitable. Until the Government does win such a judgment, however, someone else owns the property. That person may therefore invoke any defense available to the owner of the property before the forfeiture is decreed.

In this case a statute allows respondent to prove that she is an innocent owner. And, as the Chief Justice further explained in *Grundy*, if a forfeiture is authorized by statute, "the rules of the common law may be dispensed with," 3 Cranch, at 351. Congress had the opportunity to dispense with the common-law doctrine when it enacted §881(h); as we read that subsection, however, Congress merely codified the common-law rule. Because that rule was never applied to the forfeiture of proceeds, and because the statute now contains an innocent owner defense, it may not be immediately clear that they lead to the same result.

The 1984 amendment provides:

> "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U. S. C. §881(h).

Because proceeds traceable to illegal drug transactions are a species of "property described in subsection (a)," the Government argues that this provision has the effect of preventing such proceeds from becoming the property of anyone other than the United States. The argument fails.

Although proceeds subject to § 881(h) are "described" in the first part of subsection (a)(6), the last clause of that subsection exempts certain proceeds—proceeds owned by one unaware of their criminal source—from forfeiture. As the Senate Report on the 1984 amendment correctly observed, the amendment applies only to "property which is subject to civil forfeiture under section 881(a)."[22] Under § 881(a)(6), the property of one who can satisfy the innocent owner defense is not subject to civil forfeiture. Because the success of any defense available under § 881(a) will necessarily determine whether § 881(h) applies, § 881(a)(6) must allow an assertion of the defense *before* § 881(h) applies.[23]

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[22] The Report provides:

"Section 306 also adds two new subsections at the end of section 881. The first provides that all right, title, and interest in *property which is subject to civil forfeiture under section 881(a)* vests in the United States upon the commission of the acts giving rise to the forfeiture." S. Rep. No. 98–225, p. 215 (1983) (emphasis added).

[23] The logic of the Government's argument would apparently apply as well to the innocent owner defense added to the statute in 1988. That amendment provides, in part:

"[N]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." § 6075(3)(C), 102 Stat. 4324.

That amendment presumably was enacted to protect lessors like the owner whose yacht was forfeited in a proceeding that led this Court to observe:

"It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. See, [*Peisch* v. *Ware,* 4 Cranch 347, 364 (1808)]; *Goldsmith-Grant Co.* v. *United States,* 254 U. S., at 512; *United States* v. *One Ford Coupe Automobile,* 272 U. S., at 333; *Van Oster* v. *Kansas,* 272 U. S., at 467. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive. Cf. *Armstrong* v.

Therefore, when Congress enacted this innocent owner defense, and then specifically inserted this relation back provision into the statute, it did not disturb the common-law rights of either owners of forfeitable property or the Government. The common-law rule had always allowed owners to invoke defenses made available to them *before* the Government's title vested, and after title *did* vest, the common-law rule had always related that title back to the date of the commission of the act that made the specific property forfeitable. Our decision denies the Government no benefits of the relation back doctrine. The Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. And it cannot profit from the statutory version of that doctrine in § 881(h) until respondent has had the chance to invoke and offer evidence to support the innocent owner defense under § 881(a)(6).

V

As a postscript we identify two issues that the parties have addressed, but that need not be decided.

The Government has argued that the Court of Appeals' construction of the statute is highly implausible because it would enable a transferee of the proceeds of an illegal exchange to qualify as an innocent owner if she was unaware of the illegal transaction when it occurred but learned about it before she accepted the forfeitable proceeds. Respondent disputes this reading of the statute and argues that both legislative history and common sense suggest that the transferee's lack of knowledge must be established as of the time the proceeds at issue are transferred.[24] Moreover, whether

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United States, 364 U. S. 40, 49 (1960)." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S., at 689–690 (footnote omitted).

[24] See Brief for Respondent 31–32, 37–38; Tr. of Oral Arg. 38. The several *amici* make the same point, see Brief for American Bankers Association as *Amicus Curiae* 15; Brief for Federal Home Loan Mortgage Corpo-

or not the text of the statute is sufficiently ambiguous to justify resort to the legislative history, equitable doctrines may foreclose the assertion of an innocent owner defense by a party with guilty knowledge of the tainted character of the property. In all events, we need not resolve this issue in this case; respondent has assumed the burden of convincing the trier of fact that she had no knowledge of the alleged source of Brenna's gift in 1982, when she received it.[25] In its order denying respondent's motion for summary judgment, the District Court assumed that respondent could prove what she had alleged, as did the Court of Appeals in allowing the interlocutory appeal from that order. We merely decide, as did both of those courts, whether her asserted defense was insufficient as a matter of law.[26]

At oral argument, the Government also suggested that the statutory reference to "all proceeds traceable to such an exchange" is subject to a narrowing construction that might avoid some of the harsh consequences suggested in the various *amici* briefs expressing concerns about the impact of the statute on real estate titles. See Tr. of Oral Arg. 5–10, 19–25. If a house were received in exchange for a quantity of illegal substances and that house were in turn exchanged for another house, would the traceable proceeds consist of the first house, the second house, or both, with the Government having an election between the two? Questions of this char-

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ration as *Amicus Curiae* 11–12; Brief for American Land Title Association et al. as *Amici Curiae* 11–12; Brief for Dade County Tax Collector et al. as *Amici Curiae* 16–17.

[25] "The statute should be read to require that the owner assert his lack of knowledge of the criminal transaction at the time of the transfer. Since Goodwin did not have any knowledge of the alleged criminal transaction until long after the transfer, she should be protected by the innocent owner clause." Brief for Respondent 37–38.

[26] If she can show that she was unaware of the illegal source of the funds at the time Brenna transferred them to her, then she was necessarily unaware that they were the profits of an illegal transaction at the time of the transaction itself.

acter are not embraced within the issues that we granted certiorari to resolve, however, and for that reason, see *Yee* v. *Escondido*, 503 U. S. 519, 535–538 (1992), we express no opinion concerning the proper construction of that statutory term.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I am in accord with much of the plurality's reasoning, but cannot join its opinion for two reasons. First, while I agree that the "innocent owner" exception in this case produces the same result as would an "innocent owner" exception to traditional common-law forfeiture (with its relation-back principle), I do not reach that conclusion through the plurality's reading of the phrase "property described in subsection (a)," see *ante*, at 127–129, which seems to me implausible. Second, I see no proper basis for the plurality's concluding that "respondent has assumed the burden of convincing the trier of fact that she had no knowledge of the alleged source of Brenna's gift in 1982, when she received it," *ante*, at 130.

I

The Government's argument in this case has rested on the fundamental misconception that, under the common-law relation-back doctrine, all rights and legal title to the property pass to the United States "at the moment of illegal use." Brief for United States 16. Because the Government believes that the doctrine operates at the time of the illegal act, it finds the term "relation *back*" to be "something of a misnomer." *Ibid.* But the name of the doctrine is not wrong; the Government's understanding of it is. It is a doctrine of *retroactive* vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation: "[T]he decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree." *Henderson's Distilled Spirits,* 14 Wall. 44, 56 (1872). "While, under the statute in question, a judgment of forfeiture relates back to the date of the offense as proved, that result follows only from an effective judgment of condemnation." *Motlow* v. *State ex rel. Koeln,* 295 U. S. 97, 99 (1935). The relation-back rule applies only "in cases where the [Government's] title ha[s] been consummated by seizure, suit, and judgment, or decree of condemnation," *Confiscation Cases,* 7 Wall. 454, 460 (1869), whereupon "the doctrine of relation *carries back* the title to the commission of the offense," *United States* v. *Grundy,* 3 Cranch 337, 350–351 (1806) (Marshall, C. J.) (emphasis added). See also *United States* v. *Stowell,* 133 U. S. 1, 16–17 (1890), quoted *ante,* at 126–127.

Though I disagree with the Government as to the meaning of the common-law doctrine, I agree with the Government that the doctrine is embodied in the statute at issue here. The plurality, if I understand it correctly, does not say that, but merely asserts that in the present case the consequence of applying the statutory language is to produce the same result that an "innocent owner" exception under the common-law rule would produce. Title 21 U. S. C. § 881(h) provides: "All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." The plurality would read the phrase "property described in subsection (a)" as not encompassing any property that is protected from forfeiture by the "innocent owner" provision of § 881(a)(6). It proceeds to reason that since, therefore, the application of subsection (a)(6) must be determined *before* subsection (h) can be fully applied, respondent must be considered an "owner" under that provision—just as she would have been considered an "owner" (prior to decree of forfeiture) at common law.

I would not agree with the plurality's conclusion, even if I agreed with the premises upon which it is based. The fact that application of subsection (a)(6) must be determined before subsection (h) can be fully applied simply does not establish that the word "owner" in subsection (a)(6) must be deemed to include (as it would at common law) anyone who held title prior to the actual decree of forfeiture. To assume that is simply to beg the question. Besides the fact that its conclusion is a non sequitur, the plurality's premises are mistaken. To begin with, the innocent-owner provision in subsection (a)(6) does *not* insulate any "property described" in subsection (a)(6) from forfeiture; it protects only the "interest" of certain owners in *any* of the described property. But even if it could be regarded as insulating some "property described" from forfeiture, that property would still be covered by subsection (h), which refers to "property *described*," not "property *forfeited*." In sum, I do not see how the plurality can, solely by focusing on the phrase "property described in subsection (a)," establish that the word "owner" in subsection (a) includes persons holding title after the forfeiture-producing offense.

The Government agrees with me that § 881(h) "covers all 'property described in subsection (a),' including property so described that is nonetheless exempted from forfeiture because of the innocent owner defense." Brief for United States 29. That position is quite incompatible, however, with the Government's contention that § 881(h) operates at the time of the wrongful act, since if both were true *no one* would be protected under the plain language of the innocent-owner provision. In the Government's view, the term "owner" in § 881(a)(6) refers to individuals "who owned the seized assets before those assets were ever tainted by involvement in drug transactions." *Id.*, at 21. But if § 881(h) operates immediately to vest in the Government legal title to all property described in § 881(a), even that class of "owners" would be immediately divested of their property interests and would be at most "former owners" at the time of forfeiture proceedings. Because of this difficulty, the Government is forced to argue that the word "owner" in § 881(a)(6) should be interpreted to mean "former owner." Reply Brief for United States 5. Thus, if § 881(h) operates at the time of the illegal transaction as the Government contends, either the plain language of the innocent-owner provision must be slighted or the provision must be deprived of all effect. This problem does not exist if § 881(h) is read to be, not an unheard-of provision for immediate, undecreed, secret vesting of title in the United States, but rather an expression of the traditional relation-back doctrine—stating when title shall vest *if* forfeiture is decreed. On that hypothesis, the person holding legal title is genuinely the "owner" at the time (prior to the decree of forfeiture) that the court applies § 881(a)(6)'s innocent-owner provision.

I acknowledge that there is some textual difficulty with the interpretation I propose as well: § 881(h) says that title "shall vest in the United States upon commission of the act giving rise to forfeiture," and I am reading it to say that title "shall vest in the United States upon forfeiture, effective as of commission of the act giving rise to forfeiture." The former is certainly an imprecise way of saying the latter. But it is, I think, an imprecision one might expect in a legal culture familiar with retroactive forfeiture, and less of an imprecision than any of the other suggested interpretations require. Moreover, this interpretation locates the imprecision within a phrase where clear evidence of imprecision exists, since § 881(h)'s statement that "all right . . . shall vest in the United States" flatly contradicts the statement in § 881(a) that "[t]he following shall be *subject to forfeiture* to the United States." What the United States already owns cannot be forfeited to it.

This interpretation of § 881(h) is the only one that makes sense within the structure of the statutory forfeiture procedures. Subsection 881(d) provides that forfeitures under

§ 881 are governed by the procedures applicable to "summary and judicial forfeiture, and condemnation of property for violation of the customs laws," set forth in 19 U. S. C. § 1602 *et seq.* It is clear from these procedures that the Government does not gain title to the property until there is a decree of forfeiture. Section 1604, for example, requires the Attorney General to commence proceedings in district court where such proceedings are "necessary" "for the recovery" of a forfeiture. See *United States* v. *$8,850,* 461 U. S. 555, 557–558, and n. 2 (1983) (detailing circumstances requiring judicial forfeiture proceedings). If, however, legal title to the property actually vested in the United States at the time of the illegal act, judicial forfeiture proceedings would never be "necessary." Under the customs forfeiture procedures the United States can, in certain limited circumstances, obtain title to property by an Executive declaration of forfeiture. The statute provides that such an Executive "declaration of forfeiture . . . shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States," and then specifies what that effect is: "Title *shall be deemed to vest* in the United States . . . from the date of the act for which the forfeiture was incurred." 19 U. S. C. § 1609(b) (emphasis added). Finally, if the Government's construction of § 881(h) were correct, the statute-of-limitations provision, 19 U. S. C. § 1621,[1] would need to state that title *reverts* to the former owners of the property, rather than (as it does) simply limit the right of the United States to institute an "action to recover" a forfeiture.[2]

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[1] In the proceedings below, the Government argued that § 1621 was the relevant statute of limitations for § 881 and the Court of Appeals agreed. See Brief for United States, Plaintiff-Appellee in No. 90–5823 (CA3), pp. 19–23; App. to Pet. for Cert. 14a–15a. That ruling was not appealed and is consistent with other authority. See *United States* v. *One Parcel of Real Property, 2401 S. Claremont, Independence, Mo.,* 724 F. Supp. 670, 673 (WD Mo. 1989). See also *United States* v. *$8,850,* 461 U. S. 555, 563, n. 13 (1983) (forfeiture statute not specifying procedures to be used held to incorporate statute of limitations in § 1621).

The traditional operation of the relation-back doctrine also explains the textual difference between § 881(a)(6)'s innocent-"owner" and § 853's innocent-"transferee" provisions—a difference on which the Government relies heavily. See Brief for United States 31–35; Reply Brief for United States 10–11. Section 853, which provides for forfeiture of drug-related assets in connection with criminal convictions, uses the term "transferee"—not "owner"—to protect the interests of persons who acquire property after the illegal act has occurred.[3] The Government contends that the reason for this variance is that the term "owner" simply does not cover persons acquiring interests after the illegal act. That explanation arrives under a cloud of suspicion, since it is impossible to imagine (and the Government was unable to suggest) *why* Congress would provide greater protection for postoffense owners (or "transferees") in the context of criminal forfeitures. The real explanation, I think, is that the term "owner" could not accurately be used in the context of

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[2] Section 881(d) provides that the customs procedures are applicable only to the extent "not inconsistent with the provisions [of § 881]"—so one might argue that the provisions I have discussed in this paragraph, to the extent contrary to the Government's interpretation of § 881(h), are simply inapplicable. That disposition is theoretically possible but not likely, since it produces massive displacement of not merely the details but the fundamental structure of the referenced forfeiture procedures.

[3] Title 21 U. S. C. § 853(c) provides:

"All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section."

§ 853 because third parties can assert their property rights under that section only "[f]ollowing the entry of an order of forfeiture." 21 U. S. C. § 853(n). See also § 853(k) (prohibiting third parties from intervening to vindicate their property interests except as provided in subsection (n)). Thus, at the time the third-party interests are being adjudicated, the relation-back doctrine has already operated to carry back the title of the United States to the time of the act giving rise to the forfeiture, and the third parties have been divested of their property interests. See § 853(c) (codifying the relation-back principle for criminal forfeiture). Indeed, if the court finds that the transferee has a valid claim under the statute, it must "amend the order of forfeiture." § 853(n)(6).

The owner/transferee distinction is found in other provisions throughout the United States Code, and the traditional relation-back doctrine provides the only explanation for it. While Congress has provided for the protection of "owners" in many other forfeiture statutes, see, *e. g.*, 15 U. S. C. § 715f(a) (allowing court to order the return of oil subject to forfeiture "to the owner thereof"); 16 U. S. C. § 2409(c) (permitting the "owner" of property seized for forfeiture to recover it, *pendente lite*, by posting bond); § 2439(c) (same); 18 U. S. C. § 512(a) (permitting the "owner" of motor vehicle with altered identification number to avoid forfeiture by proving lack of knowledge), it consistently protects "transferees" in criminal forfeiture statutes that follow the procedure set forth in § 853: forfeiture first, claims of third parties second. See 18 U. S. C. § 1467 (criminal forfeitures for obscenity); 18 U. S. C. § 1963 (1988 ed. and Supp. III) (criminal RICO forfeitures); 18 U. S. C. § 2253 (1988 ed. and Supp. III) (criminal forfeitures for sexual exploitation of children).[4]

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[4] It is worth observing that, if the Government's view of the relation-back principle were correct, the protection provided for transferees in the last-mentioned statute would be utterly illusory. The property subject to forfeiture under 18 U. S. C. § 2253 (1988 ed. and Supp. III) is also covered by a parallel civil forfeiture statute that follows the pattern of § 881: It

I think the result reached today is correct because the relation-back principle recited in § 881(h) is the familiar, traditional one, and the term "owner" in § 881(a)(6) bears its ordinary meaning.

II

I cannot join the plurality's conclusion that respondent has assumed the burden of proving that "she had no knowledge of the alleged source of Brenna's gift in 1982, when she received it." *Ante,* at 130. To support this, the plurality cites a passage from respondent's brief taking the position that the owner's lack of knowledge of the criminal activity should be tested "at the time of the transfer," Brief for Respondent 37–38. The fact of the matter is that *both* parties took positions before this Court that may be against their interests on remand. The Government may find inconvenient its contention that "the statutory test for innocence . . . looks to the claimant's awareness of the illegal acts giving rise to forfeiture at the time they occur." Reply Brief for United States 8. Which, if either, party will be estopped from changing position is an issue that we should not address for two simple reasons: (1) Neither party has yet attempted to change position. (2) The issue is not fairly included within the question on which the Court granted certiorari. (That question was, "Whether a person who receives a gift of money derived from drug trafficking and uses that money to purchase real property is entitled to assert an 'innocent owner' defense in an action seeking civil forfeiture of the real prop-

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protects only the rights of "owners," and has an express relation-back provision. See 18 U. S. C. §§ 2254(a), 2254(g) (1988 ed. and Supp. III). Under the Government's view, whenever the United States would be unable to obtain property through the criminal forfeiture mechanism because of the innocent-"transferee" defense, it could simply move against the same property in a civil forfeiture proceeding, which gives a defense only to "owners." See also 18 U. S. C. § 981 (1988 ed. and Supp. III) (civil forfeiture provision); 18 U. S. C. § 982 (1988 ed., Supp. III) (parallel criminal forfeiture statute incorporating by reference the procedures in 21 U. S. C. § 853).

erty." Pet. for Cert. i. The plurality's reformulation of the question in the first sentence of the opinion is inexplicable.)

This question of the relevant time for purposes of determining knowledge was not a separate issue in the case, but arose indirectly, by way of argumentation on the relation-back point. The Government argued that since (as it believed) knowledge had to be measured at the time of the illegal act, § 881(h) must be interpreted to vest title in the United States immediately, because otherwise the statute would produce the following "untenable result": A subsequent owner who knew of the illegal act at the time he acquired the property, but did not know of it at the time the act was committed, would be entitled to the innocent-owner defense. Brief for United States 25. That argument can be rejected by deciding *either* that the Government's view of the timing of knowledge is wrong, *or* that, even if it may be right, the problem it creates is not so severe as to compel a ruling for the Government on the relation-back issue. (I take the latter course: I do not find inconceivable the possibility that post-illegal-act transferees with post-illegal-act knowledge of the earlier illegality are provided a defense against forfeiture. The Government would still be entitled to the property held by the drug dealer and by close friends and relatives who are unable to meet their burden of proof as to ignorance of the illegal act when it occurred.) But it entirely escapes me how the Government's argument, an argument *in principle*, can be answered by simply saying that, in the present case, respondent has committed herself to prove that she had no knowledge of the source of the funds at the time she received them.

For the reasons stated, I concur in the judgment.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

Once this case left the District Court, the appellate courts and all counsel began to grapple with the wrong issue, one that need not be addressed. The right question, I submit, is not whether the donee's ownership meets the statutory test of innocence. 21 U. S. C. § 881(a)(6). Instead, the threshold and dispositive inquiry is whether the donee had any ownership rights that required a separate forfeiture, given that her title was defective and subject to the Government's claim from the outset. We must ask whether a wrongdoer holding a forfeitable asset, property in which the United States has an undoubted superior claim, can defeat that claim by a transfer for no value. Under settled principles of property transfers, trusts, and commercial transactions, the answer is no. We need not address the donee's position except to acknowledge that she has whatever right the donor had, a right which falls before the Government's superior claim. In this case, forfeiture is determined by the title and ownership of the asset in the hands of the donor, not the donee. The position of respondent as the present holder of the asset and her knowledge, or lack of knowledge, regarding any drug offenses are, under these facts, but abstract inquiries, unnecessary to the resolution of the case.

I

We can begin with the state of affairs when the alleged drug dealer held the funds he was later to transfer to respondent. Those moneys were proceeds of unlawful drug transactions and in the dealer's hands were, without question, subject to forfeiture under § 881(a)(6). The dealer did not just know of the illegal acts; he performed them. As the case is presented to us, any defense of his based on lack of knowledge is not a possibility. As long as the dealer held the illegal asset, it was subject to forfeiture and to the claim of the United States, which had a superior interest in the property.

Suppose the drug dealer with unlawful proceeds had encountered a swindler who, knowing nothing of the dealer's drug offenses, defrauded him of the forfeitable property. In an action by the Government against the property, it need not seek to forfeit any ownership interest of the swindler. In the *in rem* proceeding the Government would need to establish only the forfeitable character of the property in the hands of the dealer and then trace the property to the swindler who, having no higher or better title to interpose, must yield to the Government's interest. In this context we would not entertain an argument that the swindler could keep the property because he had no knowledge of the illegal drug transaction. The defect in title arose in the hands of the first holder and was not eliminated by the transfer procured through fraud. Thus the only possible "interest of an owner," § 881(a)(6), that the swindler could hold was one inferior to the interest of the United States.

Here, of course, the holder is a donee, not a swindler, but the result is the same. As against a claimant with a superior right enforceable against the donor, a donee has no defense save as might exist, say, under a statute of limitations. The case would be different, of course, if the donee had in turn transferred the property to a bona fide purchaser for full consideration. The voidable title in the asset at that point would become unassailable in the purchaser, subject to any heightened rules of innocence the Government might lawfully impose under the forfeiture laws. But there is no bona fide purchaser here.

The matter not having been argued before us in these terms, perhaps it is premature to say whether the controlling law for transferring and tracing property rights of the United States under § 881 is federal common law, see *Boyle* v. *United Technologies Corp.*, 487 U. S. 500 (1988); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943), or the law of the State governing the transfer under normal conflict-of-law rules, which here appears to be New Jersey. That matter could be explored on remand if the parties thought anything turned upon it, though the result likely would be the same under either source of law because the controlling principles are so well settled.

The controlling principles are established by the law of voidable title, a centuries-old concept now codified in 49 States as part of their adoption of the Uniform Commercial Code. 1 J. White & R. Summers, Uniform Commercial Code 1, 186–191 (3d ed. 1988). These principles should control the inquiry into whether property once "subject to forfeiture to the United States," § 881(a), remains so after subsequent transactions. Cf. R. Brown, Personal Property § 70, pp. 237–238 (2d ed. 1955); Restatement (Second) of Trusts §§ 284, 287, 289, pp. 47–48, 54–56 (1959); Restatement (Second) of Property § 34.9, p. 338 (1992). The primary rules of voidable title are manageable and few in number. The first is that one who purchases property in good faith and for value from the holder of voidable title obtains good title. The second rule, reciprocal to the first, is that one who acquires property from a holder of voidable title other than by a good-faith purchase for value obtains nothing beyond what the transferor held. The third rule is that a transferee who acquires property from a good-faith purchaser for value or one of his lawful successors obtains good title, even if the transferee did not pay value or act in good faith. See Ames, Purchase for Value Without Notice, 1 Harv. L. Rev. 1 (1887); Uniform Commercial Code § 2–403(1) (Official Draft 1978); Uniform Commercial Code § 2–403(1) (Official Draft 1957); Uniform Commercial Code § 2–403(1) (Official Draft 1952). See also 4 A. Scott & W. Fratcher, Law of Trusts §§ 284–289, pp. 35–70 (4th ed. 1989); Searey, Purchase for Value Without Notice, 23 Yale L. J. 447 (1914).

Applying these rules to a transferee of proceeds from a drug sale, it follows that the transferee must be, or take from, a bona fide purchaser for value to assert an innocent owner defense under § 881(a)(6). Bona fide purchasers for value or their lawful successors, having engaged in or benefited from a transaction that the law accepts as capable of creating property rights instead of merely transferring possession, are entitled to test their claim of ownership under § 881(a)(6) against what the Government alleges to be its own superior right. The outcome, that one who had defective title can create good title in the new holder by transfer for value, is not to be condemned as some bizarre surprise. This is not alchemy. It is the common law. See *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640, 647 (1927); *United States* v. *Chase Nat. Bank,* 252 U. S. 485, 494 (1920); *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, 403 (1915). By contrast, the donee of drug trafficking proceeds has no valid claim to the proceeds, not because she has done anything wrong but because she stands in the shoes of one who has. It is the nature of the donor's interest, which the donee has assumed, that renders the property subject to forfeiture. Cf. *Otis* v. *Otis,* 167 Mass. 245, 246, 45 N. E. 737 (1897) (Holmes, J.) ("A person to whose hands a trust fund comes by conveyance from the original trustee is chargeable as a trustee in his turn, if he takes it without consideration, whether he has notice of the trust or not. This has been settled for three hundred years, since the time of uses").

When the Government seeks forfeiture of an asset in the hands of a donee, its forfeiture claim rests on defects in the title of the asset in the hands of the donor. The transferee has no ownership superior to the transferor's which must be forfeited, so her knowledge of the drug transaction, or lack thereof, is quite irrelevant, as are the arcane questions concerning the textual application of § 881(a) to someone in a donee's position. The so-called innocent owner provisions of § 881(a)(6) have ample scope in other instances, say where a holder who once had valid ownership in property is alleged to have consented to its use to facilitate a drug transaction. Furthermore, whether respondent's marital rights were present value or an antecedent debt and whether either could provide the necessary consideration for a bona fide purchase are questions that could be explored on remand, were my theory of the case to control.

II

As my opening premise is so different from the one the plurality adopts, I do not address the difficult, and quite unnecessary, puzzles encountered in its opinion and in the opinion of JUSTICE SCALIA, concurring in the judgment. It is my obligation to say, however, that the plurality's opinion leaves the forfeiture scheme that is the centerpiece of the Nation's drug enforcement laws in quite a mess.

The practical difficulties created by the plurality's interpretation of § 881 are immense, and we should not assume Congress intended such results when it enacted § 881(a)(6). To start, the plurality's interpretation of § 881(a)(6) conflicts with the principal purpose we have identified for forfeiture under the Continuing Criminal Enterprise Act, which is "the desire to lessen the economic power of . . . drug enterprises." *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 630 (1989). When a criminal transfers drug transaction proceeds to a good-faith purchaser for value, one would presume he does so because he considers what he receives from the purchaser to be of equal or greater value than what he gives to the purchaser, or because he is attempting to launder the proceeds by exchanging them for other property of near equal value. In either case, the criminal's economic power is diminished by seizing from him whatever he received in the exchange with the good-faith purchaser. On the other hand, when a criminal transfers drug transaction proceeds to another without receiving value in return, he does so, it is safe to assume, either to use his new-found, albeit illegal, wealth to benefit an associate or to shelter the proceeds from forfeiture, to be reacquired once he is clear from law enforcement authorities. In these cases, the criminal's economic power cannot be diminished by seizing what he received in the donative exchange, for he received no tangible value. If the Government is to drain the criminal's economic power, it must be able to pierce donative transfers and recapture the property given in the exchange. It is serious and surprising that the plurality today denies the Government the right to pursue the same ownership claims that under traditional and well-settled principles any other claimant or trust beneficiary or rightful owner could assert against a possessor who took for no value and who has no title or interest greater than that of the transferor.

Another oddity now given to us by the plurality's interpretation is that a gratuitous transferee must forfeit the proceeds of a drug deal if she knew of the drug deal before she received the proceeds but not if she discovered it a moment after. Yet in the latter instance, the donee, having given no value, is in no different position from the donee who had knowledge all along, save perhaps that she might have had a brief expectation the gift was clean. By contrast, the good-faith purchaser for value who, after an exchange of assets, finds out about his trading partner's illegal conduct has undergone a significant change in circumstances: He has paid fair value for those proceeds in a transaction which, as a practical matter in most cases, he cannot reverse.

III

The statutory puzzle the plurality and concurrence find so engaging is created because of a false premise, the premise that the possessor of an asset subject to forfeiture does not stand in the position of the transferor but must be charged with some guilty knowledge of her own. Forfeiture proceedings, though, are directed at an asset, and a donee in general has no more than the ownership rights of the donor. By denying this simple principle, the plurality rips out the most effective enforcement provisions in all of the drug forfeiture laws. I would reverse the judgment of the Court of Appeals, and with all due respect, I dissent from the judgment of the Court.

VOINOVICH, GOVERNOR OF OHIO, ET AL. *v.* QUILTER, SPEAKER PRO TEMPORE OF OHIO HOUSE OF REPRESENTATIVES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

No. 91–1618. Argued December 8, 1992—Decided March 2, 1993

Pursuant to the Ohio Constitution's requirement that electoral districts for the state legislature be reapportioned every 10 years, appellant James Tilling drafted and the state apportionment board adopted in 1991 an apportionment plan that created several districts in which a majority of the population is a member of a specific minority group. Appellees, Democratic board members who voted against the plan and others, filed suit in the District Court, asking that the plan be invalidated on the grounds that it violated §2 of the Voting Rights Act of 1965 and the Fourteenth and Fifteenth Amendments. A three-judge District Court ordered the board to reconsider the plan, holding that §2 of the Voting Rights Act prohibits the wholesale creation of majority-minority districts unless necessary to remedy a §2 violation; the board, it held, had failed to show such a violation. The District Court reaffirmed that holding when it reviewed the board's revised 1992 plan, rejecting appellants' argument that it should not have invalidated the 1991 plan without finding that, under the totality of the circumstances, the plan diluted minority voting strength. In addition, the court held that the board had violated the Fifteenth Amendment by applying the remedy of creating majority-minority districts intentionally and for the purpose of political advantage. It further held that the plan violated the Fourteenth Amendment by departing from the requirement that all districts be of nearly equal population.

Held:

1. The plan does not violate §2 of the Voting Rights Act. Pp. 152–158.

(a) Appellees raise an "influence-dilution" claim. They contend that, by packing black voters in a few districts with a disproportionately large black voter population, the plan deprived them of a larger number of districts in which they would have been an influential minority capable of electing their candidates of choice with the help of cross-over votes from white voters. While this Court has not decided whether such a claim is viable under §2, the Court assumes for the purpose of resolving this case that appellees have stated a cognizable §2 claim. Pp. 152–154.

(b) Plaintiffs can prevail on a §2 dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class. The District Court erred in holding that §2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation, since §2 contains no *per se* prohibitions against any particular type of district. Instead, it focuses exclusively on the consequences of apportionment. The court also mistakenly placed the burden of justifying apportionment on Ohio by requiring appellants to justify the creation of majority-minority districts. Section 2(b) places at least the initial burden of proving an apportionment's invalidity on the plaintiff's shoulders. Although the *federal courts* may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law, that prohibition does not extend to the States. The federal courts are barred from intervening in state apportionment in the absence of such a violation precisely because it is the domain of the States and not the federal courts to conduct apportionment in the first place. Pp. 154–157.

(c) The District Court, had it applied the three-part vote-dilution test of *Thornburg* v. *Gingles*, 478 U. S. 30, 50–51, would have rejected appellees' §2 claim on the ground that appellees failed to demonstrate *Gingles'* third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The court specifically found, and appellees agree, that Ohio does not suffer from racially polarized voting. Pp. 157–158.

2. The District Court's holding that the board violated the Fifteenth Amendment by intentionally diluting minority voting strength for political reasons is clearly erroneous. Tilling's preference for federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause. Nor does the fact that Tilling, a Republican, possessed Democratic documents speculating about possible discriminatory strategies Tilling might use demonstrate that Tilling in fact had such a discriminatory strategy. Nothing in the record indicates that Tilling relied on those documents in preparing the plan. Indeed, the record indicates that Tilling and the board relied on sources, such as the National Association for the Advancement of Colored People, Ohio Conference of Branches, that were wholly unlikely to engage in or tolerate intentional discrimination against black voters. This Court expresses no view on the relationship between the Fifteenth Amendment and

race-conscious redistricting; it concludes only that the finding of intentional discrimination was clear error. Pp. 158–160.

3. The District Court erred in holding that the plan violated the Fourteenth Amendment requirement that electoral districts be of nearly equal population. When the court found that the maximum total deviation from ideal district size exceeded 10%, appellees established a prima facie case of discrimination and appellants were required to justify the deviation. They attempted to do so, arguing that the deviation resulted from Ohio's constitutional policy in favor of preserving county boundaries. However, the District Court mistakenly held that total deviations in excess of 10% cannot be justified by a policy of preserving political subdivision boundaries. On remand, the court should consider whether the deviations from ideal district size are justified using the analysis employed in *Brown* v. *Thomson,* 462 U. S. 835, 843–846, and *Mahan* v. *Howell,* 410 U. S. 315, 325–330, which requires the court to determine whether the plan could reasonably be said to advance the State's policy, and, if it could, whether the resulting population disparities exceed constitutional limits. Pp. 160–162.

Reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

N. Victor Goodman argued the cause for appellants. With him on the briefs were *Orla E. Collier III, Mark D. Tucker,* and *David L. Shapiro.*

Thomas G. Hungar argued the cause *pro hac vice* for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Dunne, Deputy Solicitor General Roberts, Deputy Assistant Attorney General Turner, David K. Flynn,* and *Mark L. Gross.*

Armistead W. Gilliam, Jr., argued the cause for appellees. With him on the briefs was *Thomas I. Atkins.**

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*Briefs of *amici curiae* urging affirmance were filed for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius L. Chambers, Charles Stephen Ralston, C. Lani Guinier,* and *Pamela S. Karlan;* and for Congressman Louis Stokes et al. by *Abbe David Lowell* and *Jeffrey M. Wice.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This is yet another dispute arising out of legislative redistricting and reapportionment. See, *e. g., Growe* v. *Emison, ante,* p. 25. Today we consider whether Ohio's creation of several legislative districts dominated by minority voters violated § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973.

I

Under the Ohio Constitution, the state apportionment board must reapportion electoral districts for the state legislature every 10 years. Ohio Const., Art. XI, § 1. In 1991, the board selected James Tilling to draft a proposed apportionment plan. After conducting public hearings and meeting with members of historically underrepresented groups, Tilling drafted a plan that included eight so-called majority-minority districts—districts in which a majority of the population is a member of a specific minority group. The board adopted the plan with minor amendments by a 3-to-2 vote along party lines. The board's three Republican members voted for the plan; the two Democrats voted against it. 794 F. Supp. 695, 698, 716–717 (ND Ohio 1992); App. to Juris. Statement 160a–167a, 183a.

Appellees Barney Quilter and Thomas Ferguson, the two Democratic members of the board who voted against the plan, and various Democratic electors and legislators filed this lawsuit in the United States District Court for the Northern District of Ohio seeking the plan's invalidation. They alleged that the plan violated § 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. 794 F. Supp., at 695–696. According to appellees, the plan "packed" black voters by creating districts in which they would constitute a disproportionately large majority. This, appellees contended, minimized the total number of districts in which black voters could select their candidate of choice. In appellees' view, the plan should have created a larger number of "influence" districts—districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of crossover votes from white voters, elect their candidates of choice. See App. to Juris. Statement 141a–142a. Appellants, by contrast, argued that the plan actually enhanced the strength of black voters by providing "safe" minority-dominated districts. The plan, they pointed out, compared favorably with the 1981 apportionment and had the backing of the National Association for the Advancement of Colored People, Ohio Conference of Branches (Ohio NAACP). 794 F. Supp., at 706.

A three-judge District Court heard the case and held for appellees. Relying on various statements Tilling had made in the course of the reapportionment hearings, the court found that the board had created minority-dominated districts "whenever possible." *Id.*, at 698. The District Court rejected appellants' contention that § 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973, requires that such districts be created wherever possible. 794 F. Supp., at 699. It further held that § 2 actually prohibits the "wholesale creation of majority-minority districts" unless necessary to "'remedy'" a § 2 violation. *Id.*, at 701. The District Court therefore ordered the board to draft a new plan or demonstrate that it was remedying a § 2 violation. *Id.*, at 702.

Judge Dowd dissented, arguing that the majority's analysis "place[d] the cart before the horse." *Id.*, at 709. In his view, § 2 does not require the State to show a violation before creating a majority-minority district. Rather, the State may create any district it might desire, so long as minority voting strength is not diluted as a result. Because appellees failed to demonstrate that the 1991 plan diluted the balloting strength of black voters, Judge Dowd thought their challenge should fail. *Id.*, at 710.

The apportionment board responded by creating a record that, in its view, justified the creation of majority-minority districts. The board also adjusted the plan to correct "technical" errors that the Ohio Supreme Court had identified in its independent review of the plan. This revised 1992 plan created only five majority-black districts. App. to Juris. Statement 258a–263a. The District Court, however, was not satisfied with the board's proof. In an order issued on March 10, 1992, it held that "the [b]oard fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." 794 F. Supp. 756, 757 (ND Ohio). The court then appointed a special master to prepare a redistricting plan. *Ibid.* Once again, Judge Dowd dissented. *Id.*, at 758.

Nine days later, on March 19, 1992, the District Court issued an order reaffirming its view that the creation of majority-minority districts is impermissible under § 2 unless necessary to remedy a statutory violation. App. to Juris. Statement 128a–141a. The order also restated the court's conclusion that the board had failed to prove a violation. Specifically, it noted "the absence of racial bloc voting, the [ability of black voters] to elect both black and white candidates of their choice, and the fact that such candidates ha[d] been elected over a sustained period of time." *Id.*, at 130a. In addition, the order rejected as "clever sophistry" appellants' argument that the District Court should not have invalidated the 1991 plan without finding that, under the totality of the circumstances, it diluted minority voting strength:

> "Having implemented the Voting Rights Act remedy in the absence of a violation, [appellants] suggest that we are now required to establish a violation as a prerequisite to removing the remedy. Actually, however, this task is not as difficult as it seems. The totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been re-

> peatedly elected from districts with only a 35% black population. Against this background, the per se requirement of the creation of majority-minority districts has a dilutive effect on black votes . . . ." *Id.*, at 141a, 142a (footnotes omitted).

The District Court further concluded that, because the board had applied the " 'remedy' intentionally" and for the purpose of political advantage, it had violated not only § 2 but the Fifteenth Amendment as well. *Id.*, at 142a–143a. Finally, the court held that the plan violated the Fourteenth Amendment because it departed from the requirement that all districts be of nearly equal population. *Id.*, at 146a–148a.

On March 31, 1992, the District Court ordered that the primary elections for Ohio's General Assembly be rescheduled. 794 F. Supp. 760 (ND Ohio). On April 20, 1992, this Court granted appellants' application for a stay of the District Court's orders, 503 U. S. 979; and on June 1, 1992, we noted probable jurisdiction, 504 U. S. 954. We now reverse the judgment of the District Court and remand only for further proceedings on whether the plan's deviation from equal population among districts violates the Fourteenth Amendment.

II

Congress enacted § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973, to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be denied or abridged . . . on account of race, color, or previous condition of servitude," U. S. Const., Amdt. 15. See *NAACP* v. *New York*, 413 U. S. 345, 350 (1973). Section 2(a) of the Act prohibits the imposition of any electoral practice or procedure that "results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." Section 2(b), in relevant part, specifies that § 2(a) is violated if:

> "[B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or elec-

> tion in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973(b).

Section 2 thus prohibits any practice or procedure that, "interact[ing] with social and historical conditions," impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters. *Thornburg* v. *Gingles,* 478 U. S. 30, 47 (1986).

A

In the context of single-member districts, the usual device for diluting minority voting power is the manipulation of district lines. A politically cohesive minority group that is large enough to constitute the majority in a single-member district has a good chance of electing its candidate of choice, if the group is placed in a district where it constitutes a majority. Dividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice: If the majority in each district votes as a bloc against the minority candidate, the fragmented minority group will be unable to muster sufficient votes in any district to carry its candidate to victory.

This case focuses not on the fragmentation of a minority group among various districts but on the concentration of minority voters within a district. How such concentration or "packing" may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates. As a result, we have recognized that "[d]ilution of racial minority group voting strength may be caused" either "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Id.*, at 46, n. 11.

Appellees in this case, however, do not allege that Ohio's creation of majority-black districts prevented black voters from constituting a *majority* in additional districts. Instead, they claim that Ohio's plan deprived them of "influence districts" in which they would have constituted an influential *minority.* Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters. We have not yet decided whether influence-dilution claims such as appellees' are viable under § 2, *Growe, ante,* at 41, n. 5; see *Gingles, supra,* at 46–47, nn. 11–12 (leaving open the possibility of influence-dilution claims); nor do we decide that question today. Instead, we assume for the purpose of resolving this case that appellees in fact have stated a cognizable § 2 claim.

B

The practice challenged here, the creation of majority-minority districts, does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters. Placing black voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidate of choice. Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.

The District Court, however, initially thought it unnecessary to determine the effect of creating majority-black districts under the totality of the circumstances. In fact, the court did not believe it necessary to find vote dilution at all. It instead held that § 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation. 794 F. Supp., at 701. We disagree. Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter. See 42 U. S. C. § 1973(b). Indeed, in *Gingles* we expressly so held: "[E]lectoral devices . . . may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process." 478 U. S., at 46. As a result, the District Court was required to determine the consequences of Ohio's apportionment plan before ruling on its validity; the failure to do so was error.

The District Court's decision was flawed for another reason as well. By requiring appellants to justify the creation of majority-minority districts, the District Court placed the burden of justifying apportionment on the State. Section 2, however, places at least the initial burden of proving an apportionment's invalidity squarely on the plaintiff's shoulders. Section 2(b) specifies that § 2(a) is violated if "*it is shown*" that a state practice has the effect of denying a protected group equal access to the electoral process. 42 U. S. C. § 1973(b) (emphasis added). The burden of "show[ing]" the prohibited effect, of course, is on the plaintiff; surely Congress could not have intended the State to prove the invalidity of its own apportionment scheme. See *Gingles,* 478 U. S., at 46 (plaintiffs must demonstrate that the device results in unequal access to the electoral process); *id.,* at 49, n. 15 (plaintiffs must "prove their claim before they may be awarded relief"). The District Court relieved appellees of that burden in this case solely because the State had created majority-minority districts. Because that departure from the statutorily required allocation of burdens finds no support in the statute, it was error for the District Court to impose it.

Of course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. See *Growe, ante,* at 40–41. But that does not mean that the State's powers are similarly limited. Quite the opposite is true: Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again we have emphasized that "'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Growe, ante,* at 34 (quoting *Chapman* v. *Meier,* 420 U. S. 1, 27 (1975)). Accord, *Connor* v. *Finch,* 431 U. S. 407, 414 (1977) ("We have repeatedly emphasized that 'legislative reapportionment is primarily a matter for legislative consideration and determination'" (quoting *Reynolds* v. *Sims,* 377 U. S. 533, 586 (1964))). Because the "States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law," Brief for United States as *Amicus Curiae* 12, the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements. Cf. *Katzenbach* v. *Morgan,* 384 U. S. 641, 647–648 (1966) ("Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers" and such qualifications are valid unless they violate the Constitution or a federal statute).

Appellees' complaint does not allege that the State's conscious use of race in redistricting violates the Equal Protection Clause; the District Court below did not address the issue; and neither party raises it here. Accordingly, we express no view on how such a claim might be evaluated. We hold only that, under § 2 of the Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973, plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class.

C

In its order of March 19, 1992, the District Court found that the 1992 plan's creation of majority-minority districts "ha[d] a dilutive effect on black votes." App. to Juris. Statement 141a. Again we disagree.

In *Thornburg* v. *Gingles*, *supra*, this Court held that plaintiffs claiming vote dilution through the use of multimember districts must prove three threshold conditions. First, they must show that the minority group " 'is sufficiently large and geographically compact to constitute a majority in a single-member district.' " Second, they must prove that the minority group " 'is politically cohesive.' " Third, the plaintiffs must establish " 'that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' " *Growe*, *ante*, at 40 (quoting *Gingles*, *supra*, at 50–51). The District Court apparently thought the three *Gingles* factors inapplicable because Ohio has single-member rather than multimember districts. 794 F. Supp., at 699 ("*Gingles'* preconditions are not applicable to the apportionment of single-member districts"). In *Growe*, however, we held that the *Gingles* preconditions apply in challenges to single-member as well as multimember districts. *Ante*, at 40–41.

Had the District Court employed the *Gingles* test in this case, it would have rejected appellees' § 2 claim. Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today. *Supra*, at 154. The complaint in such a case is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority. See *ibid.* We need not decide how *Gingles*' first factor might apply here, however, because appellees have failed to demonstrate *Gingles*' third precondition—sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice. The District Court specifically found that Ohio does not suffer from "racially polarized voting." 794 F. Supp., at 700–701. Accord, App. to Juris. Statement 132a–134a, and n. 2, 139a–140a. Even appellees agree. See Tr. of Oral Arg. 25. Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U. S., at 49, n. 15. The District Court's finding of a § 2 violation, therefore, must be reversed.

III

The District Court also held that the redistricting plan violated the Fifteenth Amendment because the apportionment board intentionally diluted minority voting strength for political reasons. App. to Juris. Statement 142a–143a.

This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims; in fact, we never have held any legislative apportionment inconsistent with the Fifteenth Amendment. *Beer* v. *United States,* 425 U. S. 130, 142–143, n. 14 (1976). Nonetheless, we need not decide the precise scope of the Fifteenth Amendment's prohibition in this case. Even if we assume that the Fifteenth Amendment speaks to claims like appellees', the District Court's decision still must be reversed: Its finding of intentional discrimination was clearly erroneous. See *Mobile* v. *Bolden,* 446 U. S. 55, 62 (1980) (plurality opinion); *id.,* at 101–103 (WHITE, J., dissenting); *id.,* at 90–92 (STEVENS, J., concurring in judgment); *id.,* at 80 (BLACKMUN, J., concurring in result).

The District Court cited only two pieces of evidence to support its finding. First, the District Court thought it significant that the plan's drafter, Tilling, disregarded the requirements of the Ohio Constitution where he believed that the Voting Rights Act of 1965 required a contrary result. App. to Juris. Statement 142a–143a, n. 8. But Tilling's preference for federal over state law when he believed the two in conflict does not raise an inference of intentional discrimination; it demonstrates obedience to the Supremacy Clause of the United States Constitution. Second, the District Court cited Tilling's possession of certain documents that, according to the court, were tantamount to "a road-map detailing how [one could] create a racial gerrymander." *Id.,* at 143a, n. 9. Apparently, the District Court believed that Tilling, a Republican, sought to minimize the Democratic Party's power by diluting minority voting strength. See *ibid.* The District Court, however, failed to explain the nature of the documents. Contrary to the implication of the District Court opinion, the documents were not a set of Republican plans for diluting minority voting strength. In fact, they were not even created by Tilling or the Republicans. They were created by a Democrat who, concerned about possible Republican manipulation of apportionment, set out the various types of political gerrymandering in which he thought the Republicans might engage. App. 99–100. That Tilling possessed documents in which the opposing party speculated that he might have a discriminatory strategy does not indicate that Tilling actually had such a strategy. And nothing in the record indicates that Tilling relied on the documents in preparing the plan.

Indeed, the record demonstrates that Tilling and the board relied on sources that were wholly unlikely to engage in or tolerate intentional discrimination against black voters, including the Ohio NAACP, the Black Elected Democrats of Ohio, and the Black Elected Democrats of Cleveland, Ohio. Tilling's plan actually incorporated much of the Ohio NAACP's proposed plan; the Ohio NAACP, for its part, fully supported the 1991 apportionment plan. 794 F. Supp., at 726–729; App. to Juris. Statement 164a–167a, 269a–270a. Because the evidence not only fails to support but also directly contradicts the District Court's finding of discriminatory intent, we reverse that finding as clearly erroneous. In so doing, we express no view on the relationship between the Fifteenth Amendment and race-conscious redistricting. Cf. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey,* 430 U. S. 144, 155–165 (1977) (plurality opinion). Neither party asserts that the State's conscious use of race by itself violates the Fifteenth Amendment. Instead, they dispute whether the District Court properly found that the State intentionally discriminated against black voters. On that question, we hold only that the District Court's finding of discriminatory intent was clear error.

IV

Finally, the District Court held that the plan violated the Fourteenth Amendment because it created legislative districts of unequal size. App. to Juris. Statement 146a–148a. The Equal Protection Clause does require that electoral districts be "of nearly equal population, so that each person's vote may be given equal weight in the election of representatives." *Connor,* 431 U. S., at 416. But the requirement is not an inflexible one.

> "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown* v. *Thomson,* 462 U. S. 835, 842–843 (1983) (internal quotation marks and citations omitted).

Here, the District Court found that the maximum total deviation from ideal district size exceeded 10%. App. to Juris. Statement 148a. As a result, appellees established a prima facie case of discrimination, and appellants were required to justify the deviation. Appellants attempted to do just that, arguing that the deviation resulted from the State's constitutional policy in favor of preserving county boundaries. See Ohio Const., Arts. VII–XI. The District Court therefore was required to decide whether the "plan 'may reasonably be said to advance [the] rational state policy'" of preserving county boundaries "and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of th[e] plan exceed constitutional limits.'" *Brown, supra,* at 843 (quoting *Mahan* v. *Howell,* 410 U. S. 315, 328 (1973)). Rather than undertaking that inquiry, the District Court simply held that total deviations in excess of 10% cannot be justified by a policy of preserving the boundaries of political subdivisions. Our case law is directly to the contrary. See *Mahan* v. *Howell, supra* (upholding total deviation of over 16% where justified by the rational objective of preserving the integrity of political subdivision lines); see also *Brown* v. *Thomson, supra.* On remand, the District Court should consider whether the deviations from the ideal district size are justified using the analysis employed in *Brown, supra,* at 843–846, and *Mahan, supra,* at 325–330.

The judgment of the District Court is reversed, and the case is remanded for further proceedings in conformity with this opinion.

So ordered.

LEATHERMAN ET AL. *v.* TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91–1657. Argued January 12, 1993—Decided March 3, 1993

Petitioner homeowners filed suit under 42 U. S. C. § 1983 against respondents—local officials acting in their official capacity, a county, and two municipal corporations—alleging that the conduct of local police officers in searching their homes for narcotics violated the Fourth Amendment, and asserting that the basis for municipal liability was the failure adequately to train the police officers involved. The Federal District Court dismissed the complaints because they failed to meet the "heightened pleading standard" adopted by the Court of Appeals, which requires that complaints against municipal corporations in § 1983 cases state with factual detail and particularity the basis for the claim. The Court of Appeals affirmed.

Held: A federal court may not apply a "heightened pleading standard"—more stringent than the usual pleading requirements of Federal Rule of Civil Procedure 8(a)—in civil rights cases alleging municipal liability under § 1983. First, the heightened standard cannot be justified on the ground that a more relaxed pleading standard would eviscerate municipalities' immunity from suit by subjecting them to expensive and time-consuming discovery in every § 1983 case. Municipalities, although free from *respondeat superior* liability under § 1983, see *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658, do not enjoy absolute or qualified immunity from § 1983 suits, *id.,* at 701; *Owen* v. *City of Independence,* 445 U. S. 622, 650. Second, it is not possible to square the heightened standard applied in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." And while Rule 9(b) requires greater particularity in pleading certain actions, it does not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. Pp. 165–169.

954 F. 2d 1054, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

Richard Gladden argued the cause *pro hac vice* for petitioners. With him on the briefs was *Don Gladden.*

Brett A. Ringle argued the cause for respondents. With him on the brief for respondents Tarrant County Narcotics Intelligence and Coordination Unit et al. was *Dixon W. Holman. Kevin J. Keith* filed a brief for respondent City of Grapevine, Texas, and *Tim G. Sralla* and *Wayne K. Olson* filed a brief for respondent City of Lake Worth, Texas.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari to decide whether a federal court may apply a "heightened pleading standard"—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability under Rev. Stat. § 1979, 42 U. S. C. § 1983. We hold it may not.

We review here a decision granting a motion to dismiss, and therefore must accept as true all the factual allegations in the complaint. See *United States* v. *Gaubert,* 499 U. S. 315, 327 (1991). This action arose out of two separate incidents involving the execution of search warrants by local law

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*Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Dan Morales,* Attorney General, *Will Pryor,* First Assistant Attorney General, *Mary F. Keller,* Deputy Attorney General, *Adrian L. Young, Michael P. Hodge, Sharon Felfe,* and *Ann Kraatz,* Assistant Attorneys General, and for the Attorneys General for their respective States as follows: *Jimmy Evans* of Alabama, *Charles E. Cole* of Alaska, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Robert A. Marks* of Hawaii, *Robert T. Stephan* of Kansas, *Nicholas J. Spaeth* of North Dakota, *Ernest D. Preate, Jr.,* of Pennsylvania, *James E. O'Neil* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, *Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Mario J. Palumbo* of West Virginia, *James E. Doyle* of Wisconsin, and *Joseph B. Meyer* of Wyoming; for the City of College Station, Texas, by *Catherine Locke;* for the National Institute of Municipal Law Officers et al. by *Richard Ruda;* and for the Texas Municipal League et al. by *Susan M. Horton.*

enforcement officers. Each involved the forcible entry into a home based on the detection of odors associated with the manufacture of narcotics. One homeowner claimed that he was assaulted by the officers after they had entered; another claimed that the police had entered her home in her absence and killed her two dogs. Plaintiffs sued several local officials in their official capacity and the county and two municipal corporations that employed the police officers involved in the incidents, asserting that the police conduct had violated the Fourth Amendment to the United States Constitution. The stated basis for municipal liability under *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978), was the failure of these bodies to adequately train the police officers involved. See *Canton* v. *Harris,* 489 U. S. 378 (1989).

The United States District Court for the Northern District of Texas ordered the complaints dismissed because they failed to meet the "heightened pleading standard" required by the decisional law of the Court of Appeals for the Fifth Circuit. 755 F. Supp. 726 (1991). The Fifth Circuit, in turn, affirmed the judgment of dismissal, 954 F. 2d 1054 (1992), and we granted certiorari, 505 U. S. 1203 (1992), to resolve a conflict among the Courts of Appeals concerning the applicability of a heightened pleading standard to § 1983 actions alleging municipal liability. Cf., *e. g., Karim-Panahi* v. *Los Angeles Police Dept.,* 839 F. 2d 621, 624 (CA9 1988) ("[A] claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice") (internal quotation marks omitted). We now reverse.

Respondents seek to defend the Fifth Circuit's application of a more rigorous pleading standard on two grounds.*

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*Respondents also argue that certain claims are barred by collateral estoppel. According to respondents, petitioners brought an unsuccessful civil rights action against two of the police officers who allegedly were involved in one of the incidents. Petitioners respond that the adverse

First, respondents claim that municipalities' freedom from *respondeat superior* liability, see *Monell, supra,* necessarily includes immunity from suit. In this sense, respondents assert, municipalities are no different from state or local officials sued in their individual capacity. Respondents reason that a more relaxed pleading requirement would subject municipalities to expensive and time-consuming discovery in every § 1983 case, eviscerating their immunity from suit and disrupting municipal functions.

This argument wrongly equates freedom from liability with immunity from suit. To be sure, we reaffirmed in *Monell* that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U. S., at 691. But, contrary to respondents' assertions, this protection against liability does not encompass immunity from suit. Indeed, this argument is flatly contradicted by *Monell* and our later decisions involving municipal liability under § 1983. In *Monell,* we overruled *Monroe* v. *Pape,* 365 U. S. 167 (1961), insofar as it held that local governments were wholly immune from suit under § 1983, though we did reserve decision on whether municipalities are entitled to some form of limited immunity. 436 U. S., at 701. Yet, when we took that issue up again in *Owen* v. *City of Independence,* 445 U. S. 622, 650 (1980), we rejected a claim that municipalities should be afforded qualified immunity, much like that afforded individual officials, based on the good faith of their agents. These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983. In short, a municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury. We thus have no occasion to con-

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ruling in this other litigation is currently on appeal and thus is not final for collateral estoppel purposes. Because this issue was neither addressed by the Fifth Circuit nor included in the questions presented, we will not consider it.

sider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials.

Second, respondents contend that the Fifth Circuit's heightened pleading standard is not really that at all. See Brief for Respondents Tarrant County Narcotics Intelligence and Coordination Unit et al. 9–10 ("[T]he Fifth Circuit's so-called 'heightened' pleading requirement is a misnomer"). According to respondents, the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law. To establish municipal liability under § 1983, respondents argue, a plaintiff must do more than plead a single instance of misconduct. This requirement, respondents insist, is consistent with a plaintiff's Rule 11 obligation to make a reasonable prefiling inquiry into the facts.

But examination of the Fifth Circuit's decision in this case makes it quite evident that the "heightened pleading standard" is just what it purports to be: a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief. See 954 F. 2d, at 1057–1058. This rule was adopted by the Fifth Circuit in *Elliott* v. *Perez*, 751 F. 2d 1472 (1985), and described in this language:

> "In cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaints state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Id.*, at 1473.

In later cases, the Fifth Circuit extended this rule to complaints against municipal corporations asserting liability under § 1983. See, *e. g.*, *Palmer* v. *San Antonio*, 810 F. 2d 514 (1987).

We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley* v. *Gibson,* 355 U. S. 41 (1957), we said in effect that the Rule meant what it said:

> "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.,* at 47 (footnote omitted).

Rule 9(b) does impose a particularity requirement in two specific instances. It provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*

The phenomenon of litigation against municipal corporations based on claimed constitutional violations by their employees dates from our decision in *Monell, supra,* where we for the first time construed § 1983 to allow such municipal liability. Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

REVES ET AL. *v.* ERNST & YOUNG

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91–886. Argued October 13, 1992—Decided March 3, 1993

A provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1962(c), makes it unlawful "for any person employed by or associated with [an interstate] enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." After respondent's predecessor, the accounting firm of Arthur Young and Company, engaged in certain activities relating to valuation of a gasohol plant on the yearly audits and financial statements of a farming cooperative, the cooperative filed for bankruptcy, and the bankruptcy trustee brought suit, alleging, *inter alia*, that the activities in question rendered Arthur Young civilly liable under § 1962(c) to petitioner holders of certain of the cooperative's notes. Among other things, the District Court applied Circuit precedent requiring, in order for such liability to attach, "some participation in the operation or management of the enterprise itself"; ruled that Arthur Young's activities failed to satisfy this test; and granted summary judgment in its favor on the RICO claim. Agreeing with the lower court's analysis, the Court of Appeals affirmed in this regard.

Held: One must participate in the operation or management of the enterprise itself in order to be subject to § 1962(c) liability. Pp. 177–186.

(a) Examination of the statutory language in the light of pertinent dictionary definitions and the context of § 1962(c) brings the section's meaning unambiguously into focus. Once it is understood that the word "conduct" requires some degree of direction, and that the word "participate" requires some part in that direction, it is clear that one must have *some* part in directing an enterprise's affairs in order to "participate, directly or indirectly, in the conduct of such . . . affairs." The "operation or management" test expresses this requirement in a formulation that is easy to apply. Pp. 177–179.

(b) The "operation or management" test finds further support in § 1962's legislative history. Pp. 179–183.

(c) RICO's "liberal construction" clause—which specifies that the "provisions of this title shall be liberally construed to effectuate its remedial purposes"—does not require rejection of the "operation or management" test. The clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. It is clear from the statute's language and legislative history that Congress did not intend to extend § 1962(c) liability beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity. Pp. 183–184.

(d) The "operation or management" test is consistent with the proposition that liability under § 1962(c) is not limited to upper management. "Outsiders" having no official position with the enterprise may be liable under § 1962(c) if they are "associated with" the enterprise and participate in the operation or management of the enterprise. Pp. 184–185.

(e) This Court will not overturn the lower courts' findings that respondent was entitled to summary judgment upon application of the "operation or management" test to the facts of this case. The failure to tell the cooperative's board that the gasohol plant should have been valued in a particular way is an insufficient basis for concluding that Arthur Young participated in the operation or management of the cooperative itself. Pp. 185–186.

937 F. 2d 1310, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., joined, and in all but Part IV–A of which SCALIA and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 186.

Gary M. Elden argued the cause for petitioners. With him on the briefs were *John R. McCambridge, Jay R. Hoffman,* and *Robert R. Cloar.*

Michael R. Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller,* and *Deputy Solicitor General Bryson.*

Kathryn A. Oberly argued the cause for respondent. With her on the brief were *Bruce M. Cormier, John Matson, Carl D. Liggio,* and *Fred Lovitch.**

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Insurance Commissioners by *Ellen G. Robinson* and *C. Philip Curley;* for the National Association of Securities and Commercial Law

JUSTICE BLACKMUN delivered the opinion of the Court.[1]

This case requires us once again to interpret the provisions of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970, Pub. L. 91–452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961–1968 (1988 ed. and Supp. II). Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." The question presented is whether one must participate in the operation or management of the enterprise itself to be subject to liability under this provision.

I

The Farmer's Cooperative of Arkansas and Oklahoma, Inc. (Co-Op), began operating in western Arkansas and eastern Oklahoma in 1946. To raise money for operating expenses, the Co-Op sold promissory notes payable to the holder on demand. Each year, Co-Op members were elected to serve on its board. The board met monthly but delegated actual management of the Co-Op to a general manager. In 1952, the board appointed Jack White as general manager.

In January 1980, White began taking loans from the Co-Op to finance the construction of a gasohol plant by his company,

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Attorneys by *Kevin P. Roddy* and *William S. Lerach;* and for Trial Lawyers for Public Justice, P. C., by *G. Robert Blakey* and *Arthur H. Bryant.*

Laurence Gold, Robert Weinberg, Martin S. Lederman, Jed S. Rakoff, and *Michael L. Waldman* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Louis A. Craco filed a brief for the American Institute of Certified Public Accountants as *amicus curiae.*

[1] JUSTICE SCALIA and JUSTICE THOMAS do not join Part IV–A of this opinion.

White Flame Fuels, Inc. By the end of 1980, White's debts to the Co-Op totaled approximately $4 million. In September of that year, White and Gene Kuykendall, who served as the accountant for both the Co-Op and White Flame, were indicted for federal tax fraud. At a board meeting on November 12, 1980, White proposed that the Co-Op purchase White Flame. The board agreed. One month later, however, the Co-Op filed a declaratory action against White and White Flame in Arkansas state court alleging that White actually had sold White Flame to the Co-Op in February 1980. The complaint was drafted by White's attorneys and led to a consent decree relieving White of his debts and providing that the Co-Op had owned White Flame since February 15, 1980.

White and Kuykendall were convicted of tax fraud in January 1981. See *United States* v. *White*, 671 F. 2d 1126 (CA8 1982) (affirming their convictions). Harry Erwin, the managing partner of Russell Brown and Company, an Arkansas accounting firm, testified for White, and shortly thereafter the Co-Op retained Russell Brown to perform its 1981 financial audit. Joe Drozal, a partner in the Brown firm, was put in charge of the audit and Joe Cabaniss was selected to assist him. On January 2, 1982, Russell Brown and Company merged with Arthur Young and Company, which later became respondent Ernst & Young.[2]

One of Drozal's first tasks in the audit was to determine White Flame's fixed-asset value. After consulting with White and reviewing White Flame's books (which Kuykendall had prepared), Drozal concluded that the plant's value at the end of 1980 was $4,393,242.66, the figure Kuykendall had employed. Using this figure as a base, Drozal factored in the 1981 construction costs and capitalized expenses and concluded that White Flame's 1981 fixed-asset value was approximately $4.5 million. Drozal then had to determine how that value should be treated for accounting purposes. If the Co-Op had owned White Flame from the beginning of construction in 1979, White Flame's value for accounting purposes would be its fixed-asset value of $4.5 million. If, however, the Co-Op had purchased White Flame from White, White Flame would have to be given its fair market value at the time of purchase, which was somewhere between $444,000 and $1.5 million. If White Flame were valued at less than $1.5 million, the Co-Op was insolvent. Drozal concluded that the Co-Op had owned White Flame from the start and that the plant should be valued at $4.5 million on its books.

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[2] In order to be consistent with the terminology employed in earlier judicial writings in this case, we hereinafter refer to the respondent firm as "Arthur Young."

On April 22, 1982, Arthur Young presented its 1981 audit report to the Co-Op's board. In that audit's Note 9, Arthur Young expressed doubt whether the investment in White Flame could ever be recovered. Note 9 also observed that White Flame was sustaining operating losses averaging $100,000 per month. See *Arthur Young & Co.* v. *Reves*, 937 F. 2d 1310, 1318 (CA8 1991). Arthur Young did not tell the board of its conclusion that the Co-Op always had owned White Flame or that without that conclusion the Co-Op was insolvent.

On May 27, the Co-Op held its 1982 annual meeting. At that meeting, the Co-Op, through Harry C. Erwin, a partner in Arthur Young, distributed to the members condensed financial statements. These included White Flame's $4.5 million asset value among its total assets but omitted the information contained in the audit's Note 9. See 937 F. 2d, at 1318–1319. Cabaniss was also present. Erwin saw the condensed financial statement for the first time when he arrived at the meeting. In a 5-minute presentation, he told his audience that the statements were condensed and that copies of the full audit were available at the Co-Op's office. In response to questions, Erwin explained that the Co-Op owned White Flame and that the plant had incurred approximately $1.2 million in losses but he revealed no other information relevant to the Co-Op's true financial health.

The Co-Op hired Arthur Young also to perform its 1982 audit. The 1982 report, presented to the board on March 7, 1983, was similar to the 1981 report and restated (this time in its Note 8) Arthur Young's doubt whether the investment in White Flame was recoverable. See 937 F. 2d, at 1320. The gasohol plant again was valued at approximately $4.5 million and was responsible for the Co-Op's showing a positive net worth. The condensed financial statement distributed at the annual meeting on March 24, 1983, omitted the information in Note 8. This time, Arthur Young reviewed the condensed statement in advance but did not act to remove its name from the statement. Cabaniss, in a 3-minute presentation at the meeting, gave the financial report. He informed the members that the full audit was available at the Co-Op's office but did not tell them about Note 8 or that the Co-Op was in financial difficulty if White Flame were written down to its fair market value. *Ibid.*

In February 1984, the Co-Op experienced a slight run on its demand notes. On February 23, when it was unable to secure further financing, the Co-Op filed for bankruptcy. As a result, the demand notes were frozen in the bankruptcy estate and were no longer redeemable at will by the noteholders.

II

On February 14, 1985, the trustee in bankruptcy filed suit against 40 individuals and entities, including Arthur Young, on behalf of the Co-Op and certain noteholders. The District Court certified a class of noteholders, petitioners here, consisting of persons who had purchased demand notes between February 15, 1980, and February 23, 1984. Petitioners settled with all defendants except Arthur Young. The District Court determined before trial that the demand notes were securities under both federal and state law. See *Robertson* v. *White*, 635 F. Supp. 851, 865 (WD Ark. 1986).

The court then granted summary judgment in favor of Arthur Young on the RICO claim. See *Robertson* v. *White,* Nos. 85–2044, 85–2096, 85–2155, and 85–2259 (WD Ark., Oct. 15, 1986), App. 198–200. The District Court applied the test established by the Eighth Circuit in *Bennett* v. *Berg,* 710 F. 2d 1361, 1364 (en banc), cert. denied *sub nom. Prudential Ins. Co. of America* v. *Bennett,* 464 U. S. 1008 (1983), that § 1962(c) requires "some participation in the operation or management of the enterprise itself." App. 198. The court ruled: "Plaintiffs have failed to show anything more than that the accountants reviewed a series of completed transactions, and certified the Co-Op's records as fairly portraying its financial status as of a date three or four months preceding the meetings of the directors and the shareholders at which they presented their reports. We do not hesitate to declare that such activities fail to satisfy the degree of management required by *Bennett v. Berg.*" *Id.*, at 199–200.

The case went to trial on the state and federal securities fraud claims. The jury found that Arthur Young had committed both state and federal securities fraud and awarded approximately $6.1 million in damages. The Court of Appeals reversed, concluding that the demand notes were not securities under federal or state law. See *Arthur Young & Co.* v. *Reves,* 856 F. 2d 52, 55 (CA8 1988). On writ of certiorari, this Court ruled that the notes were securities within the meaning of § 3(a)(10) of the Securities Exchange Act of 1934, 48 Stat. 882, as amended, 15 U. S. C. § 78c(a)(10). *Reves* v. *Ernst & Young,* 494 U. S. 56, 70 (1990).

On remand, the Court of Appeals affirmed the judgment of the District Court in all major respects except the damages award, which it reversed and remanded for a new trial. See 937 F. 2d, at 1339–1340. The only part of the Court of Appeals' decision that is at issue here is its affirmance of summary judgment in favor of Arthur Young on the RICO claim. Like the District Court, the Court of Appeals applied the "operation or management" test articulated in *Ben-*

nett v. *Berg* and held that Arthur Young's conduct did not "rise to the level of participation in the management or operation of the Co-op." See 937 F. 2d, at 1324. The Court of Appeals for the District of Columbia Circuit also has adopted an "operation or management" test. See *Yellow Bus Lines, Inc.* v. *Drivers, Chauffeurs & Helpers Local Union 639*, 286 U. S. App. D. C. 182, 188, 913 F. 2d 948, 954 (1990) (en banc), cert. denied, 501 U. S. 1222 (1991). We granted certiorari, 502 U. S. 1090 (1992), to resolve the conflict between these cases and *Bank of America National Trust & Savings Assn.* v. *Touche Ross & Co.*, 782 F. 2d 966, 970 (CA11 1986) (rejecting requirement that a defendant participate in the operation or management of an enterprise).

III

"In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette*, 452 U. S. 576, 580 (1981), quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). See also *Russello* v. *United States*, 464 U. S. 16, 20 (1983). Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."

The narrow question in this case is the meaning of the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." The word "conduct" is used twice, and it seems reasonable to give each use a similar construction. See *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986). As a verb, "conduct" means to lead, run, manage, or direct. Webster's Third New International Dictionary 474 (1976). Petitioners urge us to read "conduct" as "carry on," Brief for Petitioners 23, so that almost any involvement in the affairs of an enterprise would satisfy the "conduct or participate" requirement. But context is important, and in the context of the phrase "to conduct . . . [an] enterprise's affairs," the word indicates some degree of direction.[3]

The dissent agrees that, when "conduct" is used as a verb, "it is plausible to find in it a suggestion of control." *Post,* at 187. The dissent prefers to focus on "conduct" as a noun, as in the phrase "participate, directly or indirectly, in the conduct of [an] enterprise's affairs." But unless one reads "conduct" to include an element of direction when used as a noun in this phrase, the word becomes superfluous. Congress could easily have written "participate, directly or indirectly, in [an] enterprise's affairs," but it chose to repeat the word "conduct." We conclude, therefore, that as both a noun and a verb in this subsection "conduct" requires an element of direction.

The more difficult question is what to make of the word "participate." This Court previously has characterized this word as a "ter[m] . . . of breadth." *Russello,* 464 U. S., at 21–22. Petitioners argue that Congress used "participate" as a synonym for "aid and abet." Brief for Petitioners 26. That would be a term of breadth indeed, for "aid and abet" "comprehends all assistance rendered by words, acts, encouragement, support, or presence." Black's Law Dictionary 68 (6th ed. 1990). But within the context of § 1962(c), "participate" appears to have a narrower meaning. We may mark the limits of what the term might mean by looking again at what Congress did *not* say. On the one hand, "to participate . . . in the conduct of . . . affairs" must be broader than "to conduct affairs" or the "participate" phrase would be superfluous. On the other hand, as we already have noted, "to participate . . . in the conduct of . . . affairs" must be narrower than "to participate in affairs" or Congress' repetition of the word "conduct" would serve no purpose. It seems that Congress chose a middle ground, consistent with a common understanding of the word "participate"—"to take part in." Webster's Third New International Dictionary 1646 (1976).

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[3] The United States calls our attention to the use of the word "conduct" in 18 U. S. C. § 1955(a), which penalizes anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." See Brief for United States as *Amicus Curiae* 13, n. 11; Tr. of Oral Arg. 24–25. This Court previously has noted that the Courts of Appeals have interpreted this statute to proscribe "any degree of participation in an illegal gambling business, except participation as a mere bettor." *Sanabria* v. *United States,* 437 U. S. 54, 70–71, n. 26 (1978). We may assume, however, that "conducts" has been given a broad reading in this context to distinguish it from "manages, supervises, [or] directs."

Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise,[4] but *some* part in directing the enterprise's affairs is required. The "operation or management" test expresses this requirement in a formulation that is easy to apply.

IV

A

This test finds further support in the legislative history of § 1962. The basic structure of § 1962 took shape in the spring of 1969. On March 20 of that year, Senator Hruska introduced S. 1623, 91st Cong., 1st Sess., which combined his previous legislative proposals. See Lynch, RICO: The Crime of Being a Criminal, Parts I & II, 87 Colum. L. Rev. 661, 676 (1987); Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies, 53 Temp. L. Q. 1009, 1017 (1980). Senate bill 1623 was titled the "Criminal Activities Profits Act" and was directed solely at the investment of proceeds derived from criminal activity.[5] It was § 2(a) of this bill that ultimately became § 1962(a).

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[4] For these reasons, we disagree with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires "*significant control* over or within an enterprise." *Yellow Bus Lines, Inc.* v. *Drivers, Chauffeurs & Helpers Local Union 639*, 286 U. S. App. D. C. 182, 188, 913 F. 2d 948, 954 (1990) (en banc) (emphasis added), cert. denied, 501 U. S. 1222 (1991).

On April 18, Senators McClellan and Hruska introduced S. 1861, 91st Cong., 1st Sess., which recast S. 1623 and added provisions that became §§ 1962(b) and (c).[6] See Blakey, The

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[5] Senate bill 1623 provided in relevant part:

"Sec. 2. (a) Whoever, being a person who has received any income derived directly or indirectly from any criminal activity in which such person has participated as a principal within the meaning of section 2, title 18, United States Code applies any part of such income or the proceeds of any such income to the acquisition by or on behalf of such person of legal title to or any beneficial interest in any of the assets, liabilities, or capital of any business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce shall be guilty of a felony and shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

[6] Senate bill 1861 provided in relevant part:

"§ 1962. Prohibited racketeering activities

"(a) It shall be unlawful for any person who has knowingly received any income derived, directly or indirectly, from a pattern by *[sic]* racketeering activity to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(b) It shall be unlawful for any person to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, through a pattern of racketeering activity or through collection of unlawful debt.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or

RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg,* 58 Notre Dame L. Rev. 237, 264, n. 76 (1982). The first line of S. 1861 reflected its expanded purpose: "to prohibit the infiltration *or management* of legitimate organizations by racketeering activity or the proceeds of racketeering activity" (emphasis added).

On June 3, Assistant Attorney General Will Wilson presented the views of the Department of Justice on a number of bills relating to organized crime, including S. 1623 and S. 1861, to the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary. Wilson criticized S. 1623 on the ground that "it is too narrow in that it merely prohibits the investment of prohibited funds in a business, but fails to prohibit the control *or operation* of such a business by means of prohibited racketeering activities." Measures Related to Organized Crime: Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 387 (1969) (emphasis added). He praised S. 1861 because the "criminal provisions of the bill contained in Section 1962 are broad enough to cover most of the methods by which ownership, control *and operation* of business concerns are acquired." *Ibid.* (emphasis added). See Blakey, *supra,* at 258, n. 59.

With alterations not relevant here, S. 1861 became Title IX of S. 30. The House and Senate Reports that accompanied S. 30 described the three-part structure of § 1962:

> "(1) making unlawful the receipt or use of income from 'racketeering activity' or its proceeds by a principal in commission of the activity to acquire an interest in or establish an enterprise engaged in interstate commerce; (2) prohibiting the acquisition of any enterprise engaged in interstate commerce through a 'pattern' of 'racketeer-

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foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."

> ing activity;' and (3) proscribing the *operation of any enterprise* engaged in interstate commerce through a 'pattern' of 'racketeering activity.'" H. R. Rep. No. 91–1549, p. 35 (1970); S. Rep. No. 91–617, p. 34 (1969) (emphasis added).

In their comments on the floor, Members of Congress consistently referred to subsection (c) as prohibiting the *operation* of an enterprise through a pattern of racketeering activity and to subsections (a) and (b) as prohibiting the *acquisition* of an enterprise.[7] Representative Cellar, who was chairman of the House Judiciary Committee that voted RICO out in 1970, described § 1962(c) as proscribing the "conduct of the affairs of a business by a person acting in a *managerial* capacity, through racketeering activity." 116 Cong. Rec. 35196 (1970) (emphasis added).

Of course, the fact that Members of Congress understood § 1962(c) to prohibit the operation or management of an enterprise through a pattern of racketeering activity does not necessarily mean that they understood § 1962(c) to be limited to the operation or management of an enterprise. Cf. *Turkette,* 452 U. S., at 591 (references to the infiltration of legitimate organizations do not "requir[e] the negative inference that [RICO] did not reach the activities of enterprises organized and existing for criminal purposes"). It is clear from other remarks, however, that Congress did not intend RICO to extend beyond the acquisition or operation of an enterprise. While S. 30 was being considered, critics of the bill raised concerns that racketeering activity was defined so broadly that RICO would reach many crimes not necessarily typical of organized crime. See 116 Cong. Rec. 18912–18914, 18939–18940 (1970) (remarks of Sen. McClellan). Senator McClellan reassured the bill's critics that the critical limitation was not to be found in § 1961(1)'s list of predicate crimes but in the statute's other requirements, including those of § 1962:

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[7] See, *e. g.,* 116 Cong. Rec. 607 (1970) (remarks of Sen. Byrd of West Virginia) ("to acquire an interest in businesses . . . , or to acquire or operate such businesses by racketeering methods"); *id.,* at 36294 (remarks of Sen. McClellan) ("to acquire an interest in a business . . . , to use racketeering activities as a means of acquiring such a business, or to operate such a business by racketeering methods"); *id.,* at 36296 (remarks of Sen. Dole) ("using the proceeds of racketeering activity to acquire an interest in businesses engaged in interstate commerce, or to acquire or operate such businesses by racketeering methods"); *id.,* at 35227 (remarks of Rep. Steiger) ("the use of specified racketeering methods to acquire or operate commercial organizations").

> "The danger that commission of such offenses by other individuals would subject them to proceedings under title IX [RICO] is even smaller than any such danger under title III of the 1968 [Safe Streets] [A]ct, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX." 116 Cong. Rec., at 18940.

Thus, the legislative history confirms what we have already deduced from the language of § 1962(c)—that one is not liable under that provision unless one has participated in the operation or management of the enterprise itself.

B

RICO's "liberal construction" clause does not require rejection of the "operation or management" test. Congress directed, by § 904(a) of Pub. L. 91–452, 84 Stat. 947, see note following 18 U. S. C. § 1961, p. 438, that the "provisions of this title shall be liberally construed to effectuate its remedial purposes." This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation. The clause "'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.'" *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 492, n. 10 (1985), quoting *Callanan* v. *United States*, 364 U. S. 587, 596 (1961). In this case it is clear that Congress did not intend to extend RICO liability under § 1962(c) beyond those who participate in the operation or management of an enterprise through a pattern of racketeering activity.[8]

V

Petitioners argue that the "operation or management" test is flawed because liability under § 1962(c) is not limited to upper management but may extend to "any person employed by or associated with [the] enterprise." Brief for Petitioners 37–40. We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the "operation or management" test is inconsistent with this proposition. An enterprise is "operated" not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management.[9] An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, for example, by bribery.

The United States also argues that the "operation or management" test is not consistent with § 1962(c) because it limits the liability of "outsiders" who have no official position within the enterprise. Brief for United States as *Amicus Curiae* 12 and 15. The United States correctly points out that RICO's major purpose was to attack the "infiltration of organized crime and racketeering into legitimate organizations," S. Rep. No. 91–617, at 76, but its argument fails on several counts. First, it ignores the fact that § 1962 has four subsections. Infiltration of legitimate organizations by "outsiders" is clearly addressed in subsections (a) and (b), and the "operation or management" test that applies under subsection (c) in no way limits the application of subsections (a) and (b) to "outsiders."[10] Second, § 1962(c) is limited to persons "employed by or associated with" an enterprise, suggesting a more limited reach than subsections (a) and (b), which do not contain such a restriction. Third, § 1962(c) cannot be interpreted to reach complete "outsiders" because liability depends on showing that the defendants conducted or participated in the conduct of the "*enterprise's* affairs," not just their *own* affairs. Of course, "outsiders" may be liable under § 1962(c) if they are "associated with" an enterprise and participate in the conduct of *its* affairs—that is, participate in the operation or management of the enterprise itself—but it would be consistent with neither the language nor the legislative history of § 1962(c) to interpret it as broadly as petitioners and the United States urge.

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[8] Because the meaning of the statute is clear from its language and legislative history, we have no occasion to consider the application of the rule of lenity. We note, however, that the rule of lenity would also favor the narrower "operation or management" test that we adopt.

[9] At oral argument, there was some discussion about whether low-level employees could be considered to have participated in the conduct of an enterprise's affairs. See Tr. of Oral Arg. 12, 25–27. We need not decide in this case how far § 1962(c) extends down the ladder of operation because it is clear that Arthur Young was not acting under the direction of the Co-Op's officers or board.

In sum, we hold that "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs," § 1962(c), one must participate in the operation or management of the enterprise itself.

VI

Both the District Court and the Court of Appeals applied the standard we adopt today to the facts of this case, and both found that respondent was entitled to summary judgment. Neither petitioners nor the United States have argued that these courts misapplied the "operation or management" test. The dissent argues that by creating the Co-Op's financial statements Arthur Young participated in the management of the Co-Op because "'financial statements are management's responsibility.'" *Post*, at 190, quoting 1 CCH AICPA Professional Standards, SAS No. 1, § 110.02 (1982). Although the professional standards adopted by the accounting profession may be relevant, they do not define what constitutes management of an enterprise for the purposes of § 1962(c).

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[10] Subsection (d) makes it unlawful to conspire to violate any of the other three subsections.

In this case, it is undisputed that Arthur Young relied upon existing Co-Op records in preparing the 1981 and 1982 audit reports. The AICPA's professional standards state that an auditor may draft financial statements in whole or in part based on information from management's accounting system. See *ibid.* It is also undisputed that Arthur Young's audit reports revealed to the Co-Op's board that the value of the gasohol plant had been calculated based on the Co-Op's investment in the plant. See App. in No. 87–1726 (CA8), pp. 250–251, 272–273. Thus, we only could conclude that Arthur Young participated in the operation or management of the Co-Op itself if Arthur Young's failure to tell the Co-Op's board that the plant should have been given its fair market value constituted such participation. We think that Arthur Young's failure in this respect is not sufficient to give rise to liability under § 1962(c).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE WHITE joins, dissenting.

In the word "conduct," the Court today finds a clear congressional mandate to limit RICO liability under 18 U. S. C. § 1962(c) to participants in the "operation or management" of a RICO enterprise. *Ante,* at 177–179. What strikes the Court as clear, however, looks at the very least hazy to me, and I accordingly find the statute's "liberal construction" provision not irrelevant, but dispositive. But even if I were to assume, with the majority, that the word "conduct" clearly imports some degree of direction or control into § 1962(c), I would have to say that the majority misapplies its own "operation or management" test to the facts presented here. I therefore respectfully dissent.

The word "conduct" occurs twice in § 1962(c), first as a verb, then as a noun.

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U. S. C. § 1962(c).

Although the Court is surely correct that the cognates should receive consistent readings, see *ante,* at 177, and correct again that "context is important" in coming to understand the sense of the terms intended by Congress, *ante,* at 178, the majority goes astray in quoting only the verb form of "conduct" in its statement of the context for divining a meaning that must fit the noun usage as well. Thus, the majority reaches its pivotal conclusion that "in the context of the phrase 'to conduct . . . [an] enterprise's affairs,' the word indicates some degree of direction." *Ibid.* (footnote omitted). To be sure, if the statutory setting is so abbreviated as to limit consideration to the word as a verb, it is plausible to find in it a suggestion of control, as in the phrase "to conduct an orchestra." (Even so, the suggestion is less than emphatic, since even when "conduct" is used as a verb, "[t]he notion of direction or leadership is often obscured or lost; e. g. an investigation is *conducted* by all those who take part in it." 3 Oxford English Dictionary 691 (2d ed. 1989) (emphasis in original).)

In any event, the context is not so limited, and several features of the full subsection at issue support a more inclusive construction of "conduct." The term, when used as a noun, is defined by the majority's chosen dictionary as, for example, "carrying forward" or "carrying out," Webster's Third New International Dictionary 473 (1976), phrases without any implication of direction or control. The suggestion of control is diminished further by the fact that § 1962(c) covers not just those "employed by" an enterprise, but those merely "associated with" it, as well. And associates (like employees) are prohibited not merely from conducting the affairs of an enterprise through a pattern of racketeering, not merely from participating directly in such unlawful conduct, but even from indirect participation in the conduct of an enterprise's affairs in such a manner. The very breadth of this prohibition renders the majority's reading of "conduct" rather awkward, for it is hard to imagine how the "operation or management" test would leave the statute with the capacity to reach the indirect participation of someone merely associated with an enterprise. I think, then, that this contextual examination shows "conduct" to have a long arm, unlimited by any requirement to prove that the activity includes an element of direction. But at the very least, the full context is enough to defeat the majority's conviction that the more restrictive interpretation of the word "conduct" is clearly the one intended.[1]

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[1] The Court attempts to shore up its interpretation with an examination of relevant legislative materials. See *ante,* at 179–183. The legislative history demonstrates only that when Members of Congress needed a shorthand method of referring to § 1962(c), they spoke of prohibiting "the operation" of an enterprise through a pattern of racketeering activity. As Arthur Young points out, "operation" is essentially interchangeable with "conduct"; each term can include a sense of direction, but each is also definable as "carrying on" or "carrying out." Brief for Respondent

What, then, if we call it a tie on the contextual analysis? The answer is that Congress has given courts faced with uncertain meaning a clear tiebreaker in RICO's "liberal construction" clause, which directs that the "provisions of this title shall be liberally construed to effectuate its remedial purposes." Pub. L. 91–452, § 904(a), 84 Stat. 947, note following 18 U. S. C. § 1961. We have relied before on this "express admonition" to read RICO provisions broadly, see *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 497–498 (1985), and in this instance, the "liberal construction" clause plays its intended part, directing us to recognize the more inclusive definition of the word "conduct," free of any restricting element of direction or control.[2] Because the Court of Appeals employed a narrower reading, I would reverse.

Even if I were to adopt the majority's view of § 1962(c), however, I still could not join the judgment, which seems to me unsupportable under the very "operation or management" test the Court announces. If Arthur Young had confined itself in this case to the role traditionally performed by an outside auditor, I could agree with the majority that Arthur Young took no part in the management or operation of the Farmer's Cooperative of Arkansas and Oklahoma, Inc. (Co-op). But the record on summary judgment, viewed

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22. There is no indication that the congressional shorthand was meant to attend to the statutory nuance at issue here. As the Court concedes, "[T]he fact that Members of Congress understood § 1962(c) to prohibit the operation or management of an enterprise through a pattern of racketeering activity does not necessarily mean that they understood § 1962(c) to be limited to the operation or management of an enterprise." *Ante*, at 182.

[2] The majority claims that without an element of direction, the word "conduct," when it appears as a noun, becomes superfluous. *Ante*, at 178. Given the redundant language Congress has chosen for § 1962(c), however, any consistent reading of "conduct" will tend to make one of its two appearances superfluous.

most favorably to Reves,[3] shows that Arthur Young created the very financial statements it was hired, and purported, to audit. Most importantly, Reves adduced evidence that Arthur Young took on management responsibilities by deciding, in the first instance, what value to assign to the Co-op's most important fixed asset, the White Flame gasohol plant, and Arthur Young itself conceded below that the alleged activity went beyond traditional auditing. Because I find, then, that even under the majority's "operation or management" test the Court of Appeals erroneously affirmed the summary judgment for Arthur Young, I would (again) reverse.

For our purposes, the line between managing and auditing is fairly clear. In describing the "respective responsibilities of management and auditor," Arthur Young points to the Code of Professional Conduct developed by the American Institute of Certified Public Accountants (AICPA). Brief for Respondent 31. This auditors' code points up management's ultimate responsibility for the content of financial statements:

> "The financial statements are management's responsibility. The auditor's responsibility is to express an opinion on the financial statements. Management is responsible for adopting sound accounting policies and for establishing and maintaining an internal control structure that will, among other things, record, process, summarize, and report financial data that is consistent with management's assertions embodied in the financial statements. . . . The independent auditor may make

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[3] In ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986). My description of the facts, based primarily on the District Court's view of the evidence at summary judgment, conforms to this standard.

> suggestions about the form or content of the financial statements or draft them, in whole or in part, based on information from management's accounting system." 1 CCH AICPA Professional Standards, SAS No. 1, § 110.02 (1982).

In short, management chooses the assertions to appear in financial statements; the auditor "simply expresses an opinion on the client's financial statements." Brief for Respondent 30. These standards leave no doubt that an accountant can in no sense independently audit financial records when he has selected their substance himself. See *In re Thomas P. Reynolds Securities, Ltd.*, Exchange Act Release No. 29689, 1991 SEC LEXIS 1855, *6–*7 (Sept. 16, 1991) ("A company may, of course, rely on an outside firm to prepare its books of account and financial statements. However, once an accounting firm performs those functions, it has become identified with management and may not perform an audit").

The evidence on summary judgment, read favorably to Reves, indicates that Arthur Young did indeed step out of its auditing shoes and into those of management, in creating the financial record on which the Co-op's solvency was erroneously predicated. The Co-op's 1980 financial statement gave no fixed-asset value for the White Flame gasohol plant (although the statement did say that the Co-op had advanced the plant $4.1 million during 1980, App. in No. 87–1726 (CA8), pp. 291, 295), and there is no indication that a valuation statement occurred anywhere else in the Co-op's records at that time. When Arthur Young accepted the job of preparing the Co-op's financial statement for 1981, the value to be given the plant was a matter of obvious moment. Instead of declaring the plant's valuation to be the Co-op's responsibility, and instead even of turning to management for more reliable information about the plant's value, Arthur Young basically set out to answer its own questions and to come up with its own figure for White Flame's fixed-asset value. In doing so, it repeatedly made choices calling for the exercise of a judgment that belonged to the Co-op's management in the first instance.

Arthur Young realized it could not rely on White Flame's 1980 financial statement, which had been prepared by a convicted felon (who also happened to be the Co-op's former accountant),[4] see *Arthur Young & Co.* v. *Reves*, 937 F. 2d 1310, 1316–1317 (CA8 1991), and an internal memo that appears in the record shows that Arthur Young had a number of serious questions about White Flame's cost figures for the plant. See App. in No. 87–1726, *supra*, at 1189–1191. Nonetheless, Arthur Young "essentially invented" a cost figure that matched, to the penny, the phoney figure that Kuykendall, White Flame's convicted accountant, had created. App. 138–140. With this "invented" cost figure in hand, Arthur Young then proceeded to decide, again without consulting management, when the Co-op had acquired White Flame. Although the Co-op's 1980 financial statement indicated an acquisition of White Flame in February 1980, as did a local court decree, see App. in No. 87–1726, *supra*, at 295, 1212–1214, Arthur Young "adopted a blatant fiction—that the Co-op [had] owned the entire plant at its inception in May, 1979—in order to justify carrying the asset on [the Co-op's] books at its total cost, as if the Co-op had built it from scratch." App. 137. Apparently, the idea that the Co-op had owned the gasohol plant since 1979 was reflected nowhere in the Co-op's books, and Arthur Young was solely responsible for the Co-op's decision to treat the transaction in this manner.[5]

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[4] Gene Kuykendall, the Co-op's previous "independent auditor," was involved in keeping the Co-op's books in addition to preparing and "auditing" financial statements for White Flame. See *Arthur Young & Co.* v. *Reves*, 937 F. 2d 1310, 1316–1317 (CA8 1991); *United States* v. *White*, 671 F. 2d 1126 (CA8 1982); *Robertson* v. *White*, 633 F. Supp. 954 (WD Ark. 1986). Thus, the Co-op had a history of relying on "outside" auditors for such services.

Relying on this fiction, the unreality of which it never shared with the Co-op's board of directors,[6] let alone the membership, Arthur Young prepared the Co-op's 1981 financial statement and listed a fixed-asset value of more than $4.5 million for the gasohol plant. App. in No. 87–1726 (CA8), p. 238. Arthur Young listed a similar value for White Flame in the Co-op's financial statement for 1982. *Id.*, at 261. By these actions, Arthur Young took on management responsibilities, for it thereby made assertions about the fixed-asset value of White Flame that were derived, not from information or any figure provided by the Co-op's management, but from its own financial analysis.

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[5] If Arthur Young had decided otherwise, the value of White Flame on the Co-op's books would have been its fair market value at the time of sale—three to four million dollars less. See *ante*, at 174. The "blatant fiction" created by Arthur Young maintained the Co-op's appearance of solvency and made Jack White's management "look better." App. 137–138. The District Court noted some plausible motives for Arthur Young's conduct, including a desire to keep the Co-op's business and the accountants' need "to cover themselves for having testified on behalf of White and Kuykendall in [their] 1981 criminal trial." App. 136.

The majority asserts, as an "undisputed" fact, "that Arthur Young relied upon existing Co-Op records in preparing the 1981 and 1982 audit reports." *Ante*, at 186. In fact, however, the District Court found that Reves had presented evidence sufficient to show that Arthur Young "essentially invented" a cost figure for White Flame (after examining White Flame records created by Kuykendall). See App. 138–140. Since the Co-op's 1980 financial statement indicated that the Co-op had advanced White Flame only $4.1 million through the end of 1980, see *supra*, at 191, Arthur Young could not have relied on the Co-op's records in concluding that the plant's value was nearly $4.4 million at the end of 1980. See 937 F. 2d, at 1317. The District Court also found sufficient evidence in the record to support the conclusion that Arthur Young had created the "blatant fiction" that the Co-op had owned White Flame from its inception, despite overwhelming evidence to the contrary in the Co-op's records. See App. 137–138; see also 937 F. 2d, at 1317 ("In concluding that the Co-op had always owned White Flame, [Arthur Young] ignored a great deal of information suggesting exactly the opposite"). The evidence indicates that it was creative accounting, not reliance on the Co-op's books, that led Arthur Young to treat the Co-op as the plant's owner from the time of its construction in 1979 (a conclusion necessary to support Arthur Young's decision to value the plant at total cost). Not even the decree procured in the friendly lawsuit engineered by White and his lawyers treated the Co-op as building the plant, or as owning it before February 1980. See *ante*, at 173.

[6] See 937 F. 2d, at 1318. In fact, Note 9 to the 1981 financial statement continued to indicate that the Co-op "acquired legal ownership" of White Flame in February 1980. App. in No. 87–1726 (CA8), p. 250.

Thus, the District Court, after reviewing this evidence, concluded that petitioners could show from the record that Arthur Young had "created the Co-op's financial statements." App. 199. The court also took note of evidence supporting petitioners' allegation that Arthur Young had "participated in the creation of condensed financial statements" that were handed out each year at the annual meeting of the Co-op. *Ibid.* Before the Court of Appeals, although Arthur Young disputed petitioners' claim that it had been functioning as the Co-op's *de facto* chief financial officer, Supplemental Reply Brief on Remand for Appellant in No. 87–1726 (CA8), p. 2, it did not dispute the District Court's conclusion that Reves had presented evidence showing that Arthur Young had created the Co-op's financial statements and had participated in the creation of condensed financial statements. Supplemental Brief on Remand for Appellant in No. 87–1726 (CA8), p. 20. Instead, Arthur Young argued that "[e]ven if, as here, the alleged activity goes beyond traditional auditing, it was neither an *integral* part of the management of the Co-op's affairs nor part of a *dominant*, active ownership or managerial role." *Id.*, at 21 (emphasis added).

It was only by ignoring these crucial concessions, and the evidence that obviously prompted them, that the Court of Appeals could describe Arthur Young's involvement with the

Co-op as "limited to the audits, meetings with the Board of Directors to explain the audits, and presentations at the annual meetings." 937 F. 2d, at 1324. And only then could the court have ruled that, "as a matter of law, Arthur Young's involvement with the Co-op did not rise to the level required for a RICO violation," which it described (quoting *Bennett* v. *Berg*, 710 F. 2d 1361 (CA8 1983)) as requiring only "some participation in the operation or management of the enterprise itself." 937 F. 2d, at 1324 (internal quotation marks omitted).

But petitioners' evidence and respondent's concessions of activity going beyond outside auditing can neither be ignored nor declared irrelevant. As the Court explains today, "'outsiders' may be liable under § 1962(c) if they are 'associated with' an enterprise and participate in the conduct of *its* affairs—that is, participate in the operation or management of the enterprise itself . . . ." *Ante*, at 185 (emphasis in original). Thus, the question here is whether Arthur Young, which was "associated with" the Co-op, "participated" in the Co-op's operation or management. As the Court has noted, "participate" should be read broadly in this context, see *ante*, at 178 (citing *Russello* v. *United States*, 464 U. S. 16, 21–22 (1983)), since Congress has provided that even "indirect" participation will suffice. Cf. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S., at 497–498 ("Congress' self-consciously expansive language" supports the conclusion that "RICO is to be read broadly").

The evidence petitioners presented in opposing the motion for summary judgment demonstrated Arthur Young's "participation" in this broad sense. By assuming the authority to make key decisions in stating the Co-op's own valuation of its major fixed asset, and by creating financial statements that were the responsibility of the Co-op's management, Arthur Young crossed the line separating "outside" auditors from "inside" financial managers. Because the majority, like the Court of Appeals, affirms the grant of summary judgment in spite of this evidence, I believe that it misapplies its own "operation or management" test, and I therefore respectfully dissent.

SMITH *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–1538. Argued December 7, 1992—Decided March 8, 1993

After her husband was killed in Antarctica—a sovereignless region without civil tort law of its own—while he was working for a private firm under contract to a federal agency, petitioner filed this wrongful-death action against the United States under the Federal Tort Claims Act (FTCA). The District Court dismissed the complaint for lack of subject-matter jurisdiction, holding that the claim was barred by the FTCA's foreign-country exception, which states that the statute's waiver of sovereign immunity does not apply to "[a]ny claim arising in a foreign country," 28 U. S. C. § 2680(k). The Court of Appeals affirmed.

Held: The FTCA does not apply to tortious acts or omissions occurring in Antarctica. The ordinary meaning of "foreign country" includes Antarctica, even though it has no recognized government. If this were not so, § 1346(b)—which waives sovereign immunity for certain torts committed "under circumstances where the United States, if a private person, would be liable . . . *in accordance with the law of the place where the act or omission occurred*" (emphasis added)—would have the bizarre result of instructing courts to look to the law of a place that has no law in order to determine the United States' liability. Similarly, if Antarctica were included within the FTCA's coverage, § 1402(b)—which provides that claims may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred"—would have the anomalous result of limiting venue to cases in which the claimant happened to reside in the United States, since no federal judicial district encompasses Antarctica. This interpretation of the FTCA accords with the canon of construction that prohibits courts from either extending or narrowing the statute's sovereign immunity waiver beyond what Congress intended, *United States* v. *Kubrick,* 444 U. S. 111, 117–118, and with the presumption against extraterritorial application of United States statutes, see, *e. g., EEOC* v. *Arabian American Oil Co.,* 499 U. S. 244, 248. It is unlikely that Congress, had it expressly considered the question when it passed the FTCA, would have included a desolate and extraordinarily dangerous land such as Antarctica within the statute's scope. Pp. 200–205.

953 F. 2d 1116, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, *post,* p. 205.

David J. Bederman argued the cause for petitioner. With him on the briefs were *Allen T. Murphy, Jr.,* and *David Gernant.*

Christopher J. Wright argued the cause for the United States. On the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Mahoney,* and *Mark B. Stern.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether the Federal Tort Claims Act (FTCA), 28 U. S. C. §§ 1346(b), 1402(b), 2401(b), 2671–2680 (1988 ed. and Supp. II), applies to tortious acts or omissions occurring in Antarctica, a sovereignless region without civil tort law of its own.[1] We hold that it does not.

Petitioner Sandra Jean Smith is the widow of John Emmett Smith and the duly appointed representative of his estate. At the time of his death, Smith worked as a carpenter at McMurdo Station on Ross Island, Antarctica, for a construction company under contract to the National Science Foundation, an agency of the United States. Smith and two companions one day took a recreational hike to Castle Rock, located several miles outside of McMurdo Station. On their return, they departed from the marked route to walk across a snow field in the direction of Scott Base, a New Zealand outpost not far from McMurdo Station. After stopping for a snack, one of the three men took a step and suddenly dropped from sight. Smith followed, and he, too, disappeared. Both men had fallen into a crevasse. Despite search and rescue efforts, Smith died from exposure and internal injuries suffered as a result of the fall.

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[1] Without indigenous human population and containing roughly one-tenth of the world's land mass, Antarctica is best described as "an entire continent of disputed territory." F. Auburn, Antarctic Law and Politics 1 (1982). Seven nations—Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom—presently assert formal claims to pie-shaped portions of the continent that total about 85 percent of its expanse. Boczek, The Soviet Union and the Antarctic Regime, 78 Am. J. Int'l L. 834, 840 (1984); Hayton, The Antarctic Settlement of 1959, 54 Am. J. Int'l L. 349 (1960). The United States does not recognize other nations' claims and does not itself assert a sovereign interest in Antarctica, although it maintains a basis for such a claim. Lissitzyn, The American Position on Outer Space and Antarctica, 53 Am. J. Int'l L. 126, 128 (1959). In any event, these sovereign claims have all been suspended by the terms of the Antarctic Treaty, concluded in 1959. Antarctic Treaty, Dec. 1, 1959, [1961] 12 U. S. T. 794, T. I. A. S. No. 4780. Article IV of the treaty states that no claim may be enforced, expanded, or compromised while the treaty is in force, *id.,* art. IV, 12 U. S. T., at 796, thus essentially freezing nations' sovereign claims as of the date of the treaty's execution.

Petitioner filed this wrongful-death action against the United States under the FTCA in the District Court for the District of Oregon, the district where she resides. Petitioner alleged that the United States was negligent in failing to provide adequate warning of the dangers posed by crevasses in areas beyond the marked paths. It is undisputed that petitioner's claim is based exclusively on acts or omissions occurring in Antarctica. Upon the motion of the United States, the District Court dismissed petitioner's complaint for lack of subject-matter jurisdiction, 702 F. Supp. 1480 (1989), holding that her claim was barred by 28 U. S. C. §2680(k), the foreign-country exception. Section 2680(k) precludes the exercise of jurisdiction over "[a]ny claim arising in a foreign country."

The Court of Appeals affirmed, 953 F. 2d 1116 (CA9 1991). It noted that the term "foreign country" admits of multiple interpretations, and thus looked to the language and structure of the FTCA as a whole to determine whether Antarctica is a "foreign country" within the meaning of the statute. Adopting the analysis and conclusion of then-Judge Scalia, see *Beattie* v. *United States*, 244 U. S. App. D. C. 70, 85–109, 756 F. 2d 91, 106–130 (1984) (Scalia, J., dissenting), the Court of Appeals ruled that the FTCA does not apply to claims arising in Antarctica. To hold otherwise, the Court of Appeals stated, would render two other provisions of the FTCA, 28 U. S. C. §§ 1402(b), 1346(b), nonsensical. The Court of Appeals held, in the alternative, that petitioner's suit would be barred even if Antarctica were not a "foreign country" for purposes of the FTCA. Because the FTCA was a limited relinquishment of the common-law immunity of the United States, the Court of Appeals concluded that the absence of any clear congressional intent to subject the United States to liability for claims arising in Antarctica precluded petitioner's suit. We granted certiorari to resolve a conflict between two Courts of Appeals,[2] 504 U. S. 984 (1992), and now affirm.

Petitioner argues that the scope of the foreign-country exception turns on whether the United States has recognized the legitimacy of another nation's sovereign claim over the foreign land. Otherwise, she contends, the land is not a "country" for purposes of the FTCA. Petitioner points out that the United States does not recognize the validity of other nations' claims to portions of Antarctica. She asserts, moreover, that this construction of the term "foreign country" is most consistent with the purpose underlying the foreign-country exception. According to petitioner, Congress enacted the foreign-country exception in order to insulate the United States from tort liability imposed pursuant to foreign law. Because Antarctica has no law of its own, petitioner claims that conventional choice-of-law rules control and require the application of Oregon law, the law of her domicil. Thus, petitioner concludes, the rationale for the foreign-country exception would not be compromised by the exercise of jurisdiction here, since the United States would not be subject to liability under the law of a foreign nation.

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[2] Cf. *Beattie* v. *United States,* 244 U. S. App. D. C. 70, 756 F. 2d 91 (1984) (holding that Antarctica is not a "foreign country" within the meaning of the FTCA).

Petitioner's argument for governmental liability here faces significant obstacles in addition to the foreign-country exception, but we turn first to the language of that proviso. It states that the FTCA's waiver of sovereign immunity does not apply to "[a]ny claim arising in a foreign country." 28 U. S. C. § 2680(k). Though the FTCA offers no definition of "country," the commonsense meaning of the term undermines petitioner's attempt to equate it with "sovereign state." The first dictionary definition of "country" is simply "[a] region or tract of land." Webster's New International Dictionary 609 (2d ed. 1945). To be sure, this is not the only possible interpretation of the term, and it is therefore appropriate to examine other parts of the statute before making a final determination. But the ordinary meaning of the language itself, we think, includes Antarctica, even though it has no recognized government.

Our construction of the term "foreign country" draws support from the language of § 1346(b), "[t]he principal provision of the Federal Tort Claims Act." *Richards* v. *United States,* 369 U. S. 1, 6 (1962). That section waives the sovereign immunity of the United States for certain torts committed by federal employees "under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*" 28 U. S. C. § 1346(b) (emphasis added). We have construed § 1346(b) in determining what law should apply in actions brought under the FTCA. See *Richards, supra.* But by its terms the section is more than a choice-of-law provision: It delineates the scope of the United States' waiver of sovereign immunity. If Antarctica were not a "foreign country," and for that reason included within the FTCA's coverage, § 1346(b) would instruct courts to look to the law of a place that has no law in order to determine the liability of the United States—surely a bizarre result.[3] Of course, if it were quite clear from the balance of the statute that governmental liability was intended for torts committed in Antarctica, then the failure of § 1346(b) to specify any governing law might be treated as a statutory gap that the courts could fill by decisional law. But coupled with what seems to us the most natural interpretation of the foreign-country exception, this portion of § 1346(b) reinforces the conclusion that Antarctica is excluded from the coverage of the FTCA.

Section 1346(b) is not, however, the only FTCA provision that contradicts petitioner's interpretation of the foreign-country exception. The statute's venue provision, § 1402(b), provides that claims under the FTCA may be brought "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." Because no federal judicial district encompasses Antarctica, petitioner's interpretation of the FTCA would lead to yet another anomalous result: The FTCA would establish jurisdiction for all tort claims against the United States arising in Antarctica, but no venue would exist unless the claimant happened to reside in the United States.[4] As we observed in *Brunette*

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[3] Nor can the law of the plaintiff's domicil, Oregon here, be substituted in FTCA actions based on torts committed in Antarctica. "Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred . . . ." *Richards* v. *United States*, 369 U. S. 1, 9 (1962). Petitioner does not contend that her cause of action is based on acts or omissions occurring in Oregon.

[4] The history of the FTCA reveals that Congress declined to enact earlier versions of the statute that would have differentiated between foreign and United States residents. Those versions would have barred claims "arising in a foreign country *in behalf of an alien.*" S. 2690, 76th Cong., 1st Sess., § 303(12) (1939) (emphasis added); H. R. 7236, 76th Cong., 1st Sess., § 303(12) (1939) (emphasis added). At the suggestion of the Attorney General, the last five words of the proposed bills were dropped. See Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 29, 35, 66 (1942). As we observed in

Machine Works, Ltd. v. *Kockum Industries, Inc.,* 406 U. S. 706, 710, n. 8 (1972), "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." Thus, in construing the FTCA, it is "reasonable to prefer the construction that avoids leaving such a gap," *ibid.,* especially when that construction comports with the usual meaning of a disputed term.

Our decisions interpreting the FTCA contain varying statements as to how it should be construed. See, *e. g., United States* v. *Yellow Cab Co.,* 340 U. S. 543, 547 (1951); *Dalehite* v. *United States,* 346 U. S. 15, 31 (1953); *United States* v. *Orleans,* 425 U. S. 807, 813 (1976); *Kosak* v. *United States,* 465 U. S. 848, 853, n. 9 (1984). See also *United States* v. *Nordic Village, Inc.,* 503 U. S. 30, 34 (1992). A recent statement of this sort, and the one to which we now adhere, is found in *United States* v. *Kubrick,* 444 U. S. 111, 117–118 (1979) (citations omitted): "We should also have in mind that the Act waives the immunity of the United States and that . . . we should not take it upon ourselves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended." Reading the foreign-country exception to the FTCA to exclude torts committed in Antarctica accords with this canon of construction.

Lastly, the presumption against extraterritorial application of United States statutes requires that any lingering doubt regarding the reach of the FTCA be resolved against

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United States v. *Spelar,* 338 U. S. 217, 220 (1949), "[t]he superseded draft had made the waiver of the Government's traditional immunity turn upon the fortuitous circumstance of the injured party's citizenship." The amended version, however, "identified the coverage of the Act with the scope of United States sovereignty." *Id.,* at 220–221. At least insofar as Antarctica is concerned, petitioner's interpretation of the FTCA would effectively resurrect the scheme rejected by Congress; it would deny relief to foreign residents in circumstances where United States residents could recover.

its encompassing torts committed in Antarctica. "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian American Oil Co.,* 499 U. S. 244, 248 (1991) (quoting *Foley Bros., Inc.* v. *Filardo,* 336 U. S. 281, 285 (1949)). In applying this principle, "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality." *Arabian American Oil Co., supra,* at 248; accord, *e. g., Argentine Republic* v. *Amerada Hess Shipping Corp.,* 488 U. S. 428, 440 (1989) ("When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute"). The applicability of the presumption is not defeated here just because the FTCA specifically addresses the issue of extraterritorial application in the foreign-country exception. To the contrary, as we stated in *United States* v. *Spelar,* 338 U. S. 217, 222 (1949), "[t]hat presumption, far from being overcome here, is doubly fortified by the language of this statute and the legislative purpose underlying it." Petitioner does not assert, nor could she, that there is clear evidence of congressional intent to apply the FTCA to claims arising in Antarctica.[5]

For all of these reasons, we hold that the FTCA's waiver of sovereign immunity does not apply to tort claims arising in Antarctica. Some of these reasons are based on the language and structure of the statute itself; others are based on presumptions as to extraterritorial application of Acts of Congress and as to waivers of sovereign immunity. We think these norms of statutory construction have quite likely led us to the same conclusion that the 79th Congress would have reached had it expressly considered the question we now decide: It would not have included a desolate and extraordinarily dangerous land such as Antarctica within the scope of the FTCA. The judgment of the Court of Appeals is therefore

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[5] Petitioner instead argues that the presumption against extraterritoriality applies only if it serves to avoid "'unintended clashes between our laws and those of other nations which could result in international discord.'" Brief for Petitioner 16 (quoting *EEOC* v. *Arabian American Oil Co.,* 499 U. S., at 248). But the presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind.

Affirmed.

JUSTICE STEVENS, dissenting.

In my opinion the Court's decision to grant certiorari in this case was a wise exercise of its discretion. The question whether the United States should be held responsible for the tortious conduct of its agents in the vast "sovereignless region" of Antarctica, *ante,* at 198, is profoundly important, not only because its answer identifies the character of our concern about ordinary justice, but also because Antarctica is just one of three vast sovereignless places where the negligence of federal agents may cause death or physical injury. The negligence that is alleged in this case will surely have its parallels in outer space as our astronauts continue their explorations of ungoverned regions far beyond the jurisdictional boundaries that were familiar to the Congress that enacted the Federal Tort Claims Act (FTCA) in 1946. Moreover, our jurisprudence relating to negligence of federal agents on the sovereignless high seas points unerringly to the correct disposition of this case. Unfortunately, the Court has ignored that jurisprudence in its parsimonious construction of the FTCA's "sweeping" waiver of sovereign immunity.[1]

In theory the territorial limits on the consent to sue the United States for the torts of its agents might be defined in four ways: (1) there is no such limit; (2) territory subject to the jurisdiction of a foreign country is the only exclusion; (3) it also excludes sovereignless land areas such as Antarctica, but it includes the high seas and outer space; or (4) it has an "exclusive domestic focus" that applies "only within the territorial jurisdiction of the United States."[2] The "foreign country" exclusion in 28 U. S. C. § 2680(k)[3] unquestionably eliminates the first possibility. In my opinion, the second is compelled by the text of the Act.[4] The third possibility is not expressly rejected by the Court, but the reasoning in its terse opinion seems more consistent with the Government's unambiguous adoption of the fourth, and narrowest, interpretation. I shall therefore first explain why the text of the FTCA unquestionably requires rejection of the Government's submission.

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[1] "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States* v. *Yellow Cab Co.,* 340 U. S. 543, 547 (1951).

I

The FTCA includes both a broad grant of jurisdiction to the federal courts in § 1346(b)[5] and a broad waiver of sover-

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[2] See Brief for United States 16, 21–22.

[3] "The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . . . .

"(k) Any claim arising in a foreign country." 28 U. S. C. § 2680(k).

[4] In short, I agree with most of the analysis in Judge Fletcher's dissenting opinion in this case and Judge Wilkey's opinion for the Court of Appeals for the District of Columbia Circuit in *Beattie* v. *United States*, 244 U. S. App. D. C. 70, 756 F. 2d 91 (1984). Indeed, I am persuaded that the 79th Congress would have viewed torts committed by federal agents in "desolate and extraordinarily dangerous" lands as falling squarely within the central purpose of the FTCA. *Ante*, at 205.

[5] Title 28 U. S. C. § 1346(b) provides:

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the eign immunity in § 2674.[6] Neither of these sections identifies any territorial limit on the coverage of the Act. That Congress intended and understood the broad language of those two provisions to extend beyond the territory of the United States is demonstrated by its enactment of two express exceptions from that coverage that would have been unnecessary if the initial grant of jurisdiction and waiver of immunity had been as narrow as the Government contends. One of those, of course, is the "foreign country" exclusion in § 2680(k). See n. 6, *supra.* The other is the exclusion in § 2680(d) for claims asserted under the Suits in Admiralty Act or the Public Vessels Act.[7] Without that exclusion, a party with a claim against the United States cognizable under either of those venerable statutes would have had the right to elect the pre-existing remedy or the newly enacted FTCA remedy. Quite obviously that exclusion would have been unnecessary if the FTCA waiver did not extend to the sovereignless expanses of the high seas.

Indeed, it was the enactment of the FTCA in 1946 that first subjected the United States to liability for maritime negligence claims that could not be maintained under either the Suits in Admiralty Act or the Public Vessels Act,[8] in particular, claims arising from death or injury on the high seas.

United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

[6] Section 2674 provides, in pertinent part:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

[7] Section 2680(d) excludes from the coverage of the FTCA "[a]ny claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States."

[8] See *United States* v. *United Continental Tuna Corp.*, 425 U. S. 164, 172 (1976) ("Maritime tort claims deemed beyond the reach of both Acts could be brought only on the law side of the district courts under the Federal Tort Claims Act").

As enacted in 1920, the Death on the High Seas Act (DOHSA) provided a remedy against private parties but contained no waiver of sovereign immunity.[9] That changed with the enactment of the FTCA, which waived the sovereign immunity of the United States for claims arising on the high seas under the DOHSA and the general maritime law. See, *e. g., United States* v. *Gavagan,* 280 F. 2d 319, 321 (CA5 1960) (holding United States liable, under the FTCA and the DOHSA, for death resulting from negligent rescue efforts on the high seas), cert. denied, 364 U. S. 933 (1961); *Blumenthal* v. *United States,* 189 F. Supp. 439, 446–447 (ED Pa. 1960) ("In the same manner as a private person is liable under the Death on the High Seas Act, so, too, is the Government under the Federal Tort Claims Act"), aff'd, 306 F. 2d 16 (CA3 1962); *Kunkel* v. *United States,* 140 F. Supp. 591, 594 (SD Cal. 1956) (same); *Moran* v. *United States,* 102 F. Supp. 275 (Conn. 1951) (holding that the FTCA waived the sovereign immunity of the United States for claims arising from both personal injury and death on the high seas). See also *McCormick* v. *United States,* 680 F. 2d 345, 349 (CA5 1982) (citing *Moran* with approval); *Roberts* v. *United States,* 498 F. 2d 520, 525–526 (CA9 1974) (noting that prior to 1960 amendments to Suits in Admiralty Act, FTCA waived sovereign immunity for claims under the general maritime law and the DOHSA).

In 1960, Congress amended the Suits in Admiralty Act so as to bring *all* maritime torts asserted against the United States, including those arising under the DOHSA, within the purview of the Suits in Admiralty Act and thus outside the waiver of sovereign immunity in the FTCA. See *United States* v. *United Continental Tuna Corp.,* 425 U. S. 164, 176, n. 14 (1976). There can be no disputing the fact, however, that at the time it was enacted, the FTCA waiver extended to the sovereignless reaches of the high seas. Since the geographic scope of that waiver has never been amended, the

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[9] Pub. L. 69–165, 41 Stat. 537, codified at 46 U. S. C. App. § 761 *et seq.*

Government's submission that it is confined to territory under the jurisdiction of the United States is simply untenable.

That the 79th Congress intended the waiver of sovereign immunity in the FTCA to extend to the high seas does not, of course, answer the question whether that waiver extends to the sovereignless region of Antarctica. It does, however, undermine one premise of the Court's analysis: that the presumption against the extraterritorial application of federal statutes supports its narrow construction of the geographic reach of the FTCA. As the Court itself acknowledges, see *ante*, at 204, that presumption operates "unless a contrary intent appears." Here, the contrary intent is unmistakable. The same Congress that enacted the "foreign country" exception to the broad waiver of sovereign immunity in § 2674 subjected the United States to claims for wrongful death and injury arising well beyond the territorial jurisdiction of the United States. The presumption against extraterritorial application of federal statutes simply has no bearing on this case.

II

The Government, therefore, may not prevail unless Antarctica is a "foreign country" within the meaning of the exception in subsection (k). Properly, in my view, the Court inquires as to how we are to construe this exception to the FTCA's waiver of sovereign immunity. *Ante*, at 203. Instead of answering that question, however, the Court cites a nebulous statement in *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979), and simply asserts that construing the foreign-country exception so as to deny recovery to this petitioner somehow accords with congressional intent. *Ante*, at 203.

I had thought that canons of statutory construction were tools to be used to *divine* congressional intent, not empty phrases used to *ratify* whatever result is desired in a particular case. In any event, I would answer the question that the Court poses, but then ignores. And as I read our cases, the answer is clear: Exceptions to the "'sweeping'" waiver of sovereign immunity in the FTCA should be, and have been, "narrowly construed." *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992) (quoting *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 547 (1951)).[10] Accordingly, given a choice between two acceptable interpretations of the term "country"—it may designate either a sovereign nation or an expanse of land—it is our duty to adopt the former.

Even without that rule of construction, we should favor the interpretation of the term that the Court has previously endorsed. Referring specifically to the term as used in the FTCA, we stated: "We know of no more accurate phrase in common English usage than 'foreign country' to denote territory subject to the sovereignty of another nation." *United States* v. *Spelar*, 338 U. S. 217, 219 (1949). That interpretation is consistent with a statutory scheme that imposes tort liability on the Government "in the same manner and to the same extent as a private individual under like circumstances," see n. 6, *supra*. As we explained in *Spelar*: "[T]hough Congress was ready to lay aside a great portion of the sovereign's ancient and unquestioned immunity from suit, it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." 338 U. S., at 221. Thus, the narrow interpretation of the term "foreign country" is precisely tailored to make the scope of the subsection (k) exception coextensive with its justification.

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[10] See also *Block* v. *Neal*, 460 U. S. 289, 298 (1983), and *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383 (1949). As we stated in the latter:

"In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement . . . : 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *Ibid.* (quoting *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30 (1926)).

III

The Court seeks to buttress its interpretation of the "foreign country" exception by returning to the language of the jurisdictional grant in § 1346(b). As I have noted, federal courts have jurisdiction of civil claims against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[11] Emphasizing the last dozen words, the Court essentially argues that Antarctica is "a place that has no law" and therefore it would be "bizarre" to predicate federal liability on its governing law. *Ante,* at 202.[12]

Although the words the Court has italicized indicate that Congress may not have actually thought about sovereignless regions, they surely do not support the Court's conclusion.

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[11] The Court inaccurately refers to the jurisdictional grant as the section that "waives the sovereign immunity of the United States," *ante,* at 201. It is actually § 2674 that waives immunity from liability by simply providing: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . ." See n. 6, *supra.* The Court does not quote § 2674.

[12] Apparently the Court is assuming that private contracts made in Antarctica are unenforceable and that there is no redress for torts committed by private parties in sovereignless regions. Fortunately our legal system is not that primitive. The statutory reference to "the law of the place where the act or omission occurred" was unquestionably intended to identify the substantive law that would apply to a comparable act or omission by a private party at that place. As long as private conduct is constrained by rules of law, and it certainly is in Antarctica, see *infra,* at 212–213, there is a governing "law of the place" within the meaning of the FTCA.

Those words, in conjunction with § 2674, require an answer to the question whether a private defendant, in like circumstances, would be liable to the complainant. The Court fails even to ask that question, possibly because it is so obvious that petitioner could maintain a cause of action against a private party whose negligence caused her husband's death in Antarctica. It is simply wrong to suggest, as the Court does, that Antarctica is "a place that has no law," *ante*, at 201.[13]

The relevant substantive law in this case is the law of the State of Oregon, where petitioner resides. As was well settled at English common law before our Republic was founded, a nation's personal sovereignty over its own citizens may support the exercise of civil jurisdiction in transitory actions arising in places not subject to any sovereign. *Mostyn* v. *Fabrigas*, 98 Eng. Rep. 1021, 1032 (K. B. 1774). See also *Dutton* v. *Howell*, 1 Eng. Rep. 17, 21 (H. L. 1693). This doctrine of personal sovereignty is well recognized in our cases. As Justice Holmes explained in *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909):

> "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive." *Id.*, at 355–356.

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[13] Indeed, it borders on the absurd to suggest that Antarctica is governed by nothing more than the law of the jungle. The United States exercises both criminal jurisdiction, see 18 U. S. C. § 7(7), and taxing jurisdiction, see 26 U. S. C. § 863(d)(2)(A), over the approximately 2,500 Americans that live and work in and around Antarctica each year. See National Science Foundation, Facts About the U. S. Antarctic Program 1 (July 1990). The National Science Foundation operates three year-round stations in Antarctica, the largest of which is composed of 85 buildings and has a harbor, landing strips on sea ice and shelf ice, and a helicopter pad. *Ibid.* Transportation to and from New Zealand is frequent during the summer months. *Id.*, at 2.

Justice Holmes was referring to the assertion of extraterritorial jurisdiction by the United States rather than an individual State, but it is clear that the States also have ample power to exercise legislative jurisdiction over the conduct of their own citizens abroad or on the high seas. As we explained in *Skiriotes* v. *Florida,* 313 U. S. 69 (1941):

> "If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress." *Id.,* at 77.[14]

Surely the State of Oregon, the forum State, has a substantial interest in applying its civil tort law to a case involving the allegedly wrongful death of the spouse of one of its residents. Certainly no other State has an interest in applying its law to these facts. Moreover, application of Oregon's substantive law would in no way conflict with an Act of Congress because Congress has expressly subjected the United States to the laws of the various States for torts committed by the United States and its agents. It is thus perfectly clear that were the defendant in this case a private party, there would be law to apply to determine that party's liability to petitioner. Given the plain language of § 2674, I see no basis for the Court's refusal to follow the statutory command and hold the United States "liable . . . in the same manner and to the same extent as a private individual under like circumstances."

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[14] Again, as Justice Holmes explained:

"[T]he bare fact of the parties being outside the territory [of the United States] in a place belonging to no other sovereign would not limit the authority of the State, as accepted by civilized theory. No one doubts the power of England or France to govern their own ships upon the high seas." *The Hamilton,* 207 U. S. 398, 403 (1907).

IV

Petitioner's action was filed "in the judicial district where the plaintiff resides," as § 1402(b) authorizes; there is, therefore, no objection to venue in this case. Because that provision would not provide a forum for a comparable action brought by a nonresident alien, the statute contains an omission that is no stranger to our law. In our opinion in *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U. S. 706, 710, n. 8 (1972), we identified examples of "cases in which the federal courts have jurisdiction but there is no district in which venue is proper" and stated that "in construing *venue statutes* it is reasonable to prefer the construction that avoids leaving such a gap." (Emphasis added.) Neither in that case nor in any other did we suggest that a venue gap should be avoided by adopting a narrow construction of either a jurisdictional grant or the scope of a federal cause of action. Yet that is the Court's perverse solution to the narrow venue gap in the FTCA.

Because a hypothetical handful of nonresident aliens may have no forum in which to seek relief for torts committed by federal agents in outer space or in Antarctica, the Court decides that the scope of the remedy itself should be narrowly construed. This anomalous conclusion surely derives no support whatsoever from the basic decision to include aliens as well as citizens within the protection of the statute, particularly since the overwhelming majority of aliens who may have occasion to invoke the FTCA are surely residents. As Judge Fletcher accurately observed in her dissenting opinion in the Court of Appeals:

> "Those who have no problem with venue should not be foreclosed from bringing suit simply because others cannot, particularly with respect to a statute such as the FTCA the primary purpose of which, as we have seen, was to expand the jurisdiction of the federal courts." 953 F. 2d 1116, 1122 (CA9 1991).

At most, the imperfections in the statute indicate that in 1946 the 79th Congress did not specifically consider the likelihood of negligence actions arising in outer space or in a sovereignless territory such as Antarctica. In view of the fact that it did authorize actions against the United States arising out of negligence on the high seas, see *supra*, at 207–209, I am bewildered by the Court's speculation that if it had expressly considered the equally dangerous area at issue in this case, it would have distinguished between the two. *Ante*, at 204–205. The claim asserted in this case is entirely consistent with the central purpose of the entire Act.

Indeed, given that the choice is between imposing individual liability on federal agents for torts committed in the course of their employment, on the one hand, or holding their employer responsible, on the other hand, the amendment to the FTCA adopted by Congress in 1988 sheds more light on the issue presented in this case than the Court's unfounded speculation about congressional intent. The congressional findings explaining the decision to immunize federal employees from personal liability for negligence in the performance of their duties indicate that Congress recognizes both the practical value and the justice of a generous interpretation of the FTCA.[15] Moreover, those findings are thoroughly

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[15] In enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988, the stated purpose of which was "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States," §2(b), 102 Stat. 4564, 28 U. S. C. §2671 note, Congress made the following findings:

"(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

"(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the consistent with the interpretative approach of the unusually distinguished panel of Circuit Judges who, shortly after the FTCA was passed, wrote:

> "When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself. Particularly should this be true as to the broad terms of coverage employed in the basic grant of liability itself." *Spelar* v. *United States*, 171 F. 2d 208, 209 (CA2 1948).[16]

The wisdom that prompted the Court's grant of certiorari is not reflected in its interpretation of the 1946 Act. Rather, it reflects a vision that would exclude electronic eavesdropping from the coverage of the Fourth Amendment and satellites from the coverage of the Commerce Clause. The international community includes sovereignless places but no

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responsibility of an employer for torts committed by its employees within the scope of their employment.

"(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

"(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

"(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

"(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employees torts." § 2(a), 102 Stat. 4563, 28 U. S. C. § 2671 note.

[16] The members of the panel were Learned Hand, Chief Judge, and Augustus N. Hand and Charles E. Clark, Circuit Judges.

places where there is no rule of law. Majestic legislation like the Federal Tort Claims Act should be read with the vision of the judge, enlightened by an interest in justice, not through the opaque green eyeshade of the cloistered bookkeeper. As President Lincoln observed in his first State of the Union Message:

> "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[17]

I respectfully dissent.

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[17] Cong. Globe, 37th Cong., 2d Sess., App. 2 (1861).

BUILDING & CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/ RHODE ISLAND, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 91-261. Argued December 9, 1992—Decided March 8, 1993*

Following a lawsuit over its failure to prevent the pollution of Boston Harbor, petitioner Massachusetts Water Resources Authority (MWRA)—the state agency that provides, *inter alia,* sewage services for eastern Massachusetts—was ordered to clean up the harbor. Under state law, MWRA provides the funds for construction, owns the sewage-treatment facilities to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally supervises the project. Petitioner Kaiser Engineers, Inc., the project manager selected by MWRA, negotiated an agreement with petitioner Building and Construction Trades Council and affiliated organizations (BCTC) that would assure labor stability over the life of the project, and MWRA directed in Specification 13.1 of its solicitation for project bids that each successful bidder must agree to abide by the labor agreement's terms. Respondent organization, which represents nonunion construction industry employers, filed suit against petitioners, seeking, among other things, to enjoin enforcement of Bid Specification 13.1 on the grounds that it is pre-empted under the National Labor Relations Act (NLRA). The District Court denied the organization's motion for a preliminary injunction, but the Court of Appeals reversed, holding that MWRA's intrusion into the bargaining process was pervasive and not the sort of peripheral regulation that would be permissible under *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, and that Bid Specification 13.1 was pre-empted under *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132, because MWRA was regulating activities that Congress intended to be unrestricted by governmental power.

Held: The NLRA does not pre-empt enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful

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*Together with No. 91-274, *Massachusetts Water Resources Authority et al.* v. *Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., et al.,* also on certiorari to the same court.

prehire collective-bargaining agreement negotiated by private parties. This Court has articulated two distinct NLRA pre-emption principles: "*Garmon* pre-emption" forbids state and local regulation of activities that are protected by § 7 of the NLRA or constitute an unfair labor practice under § 8, while "*Machinists* pre-emption" prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces. These pre-emption doctrines apply only to state labor *regulation*, see, *e. g., Machinists*, 427 U. S., at 144. A State may act without offending them when it acts as a proprietor and its acts therefore are not tantamount to regulation or policymaking. Permitting States to participate freely in the marketplace is not only consistent with NLRA pre-emption principles generally but also, in this case, promotes the legislative goals that animated the passage of the NLRA's §§ 8(e) and (f) exceptions regarding prehire agreements in the construction industry. It is undisputed that the agreement between Kaiser and BCTC is a valid labor contract under §§ 8(e) and (f). In enacting the exceptions, Congress intended to accommodate conditions specific to the construction industry, and there is no reason to expect the industry's defining features to depend upon the public or private nature of the entity purchasing contracting services. Absent any express or implied indication by Congress that a State may not manage its own property when pursuing a purely proprietary interest such as MWRA's interest here, and where analogous private conduct would be permitted, this Court will not infer such a restriction. Pp. 224–233.

935 F. 2d 345, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Charles Fried argued the cause for petitioners. With him on the briefs were *David L. Shapiro, John M. Stevens, Arthur G. Telegen, H. Reed Witherby, Mary R. Jeka, Steven H. Goldberg, William J. Curtin, E. Carl Uehlein, Jr., Laurence J. Cohen, Victoria L. Bor, Walter Kamiat,* and *Laurence Gold.*

Deputy Solicitor General Mahoney argued the cause for the United States as *amicus curiae* urging reversal. With her on the briefs were *Solicitor General Starr, Edwin S. Kneedler, Jerry M. Hunter, Nicholas E. Karatinos, Norton J. Come, Linda Sher,* and *John Emad Arbab.*

Maurice Baskin argued the cause for respondents. With him on the briefs was *Carol Chandler*.†

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this litigation is whether the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.*, pre-empts enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement negotiated by private parties.

I

The Massachusetts Water Resources Authority (MWRA) is an independent government agency charged by the Massachusetts Legislature with providing water-supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts. Mass. Gen. Laws Ann., ch. 92 App., § 1–1 *et seq.* (1993). Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, in alleged violation of the Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*,

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†Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Massachusetts et al. by *Scott Harshbarger,* Attorney General of Massachusetts, and *Douglas H. Wilkins,* Assistant Attorney General, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Robert J. Del Tufo,* Attorney General of New Jersey, and *Frank J. Kelley,* Attorney General of Michigan; for Mayor Raymond L. Flynn by *Albert W. Wallis;* and for the National Constructors Association et al. by *Robert W. Kopp* and *John Gaal.*

Briefs of *amici curiae* urging affirmance were filed for the Associated General Contractors of America by *Glen D. Nager, Richard F. Shaw,* and *Michael E. Kennedy;* for the Chamber of Commerce of the United States of America by *Clifton S. Elgarten, Stephen A. Bokat, Robin S. Conrad,* and *Mona C. Zeiberg;* for Master Printers of America by *Francis T. Coleman* and *William B. Cowen;* for the Merit Shop Foundation et al. by *Bruce J. Ennis, Jr.;* for the National Right to Work Legal Defense Foundation, Inc., by *Hugh L. Reilly, W. James Young,* and *Edwin Vieira, Jr.;* and for the Utility Contractors Association of New England, Inc., et al. by *Stephen S. Ostrach* and *Richard D. Wayne.*

MWRA was ordered to clean up the harbor. See *United States* v. *Metropolitan Dist. Comm'n,* 757 F. Supp. 121, 123 (Mass. 1991). The cleanup project was expected to cost $6.1 billion over 10 years. 935 F. 2d 345, 347 (CA1 1991). The District Court required construction to proceed without interruption, making no allowance for delays from causes such as labor disputes. App. 71 (Affidavit of Richard D. Fox, Director of the Program Management Division of MWRA). MWRA has primary responsibility for the project. Under its enabling statute and the Commonwealth's public-bidding laws, MWRA provides the funds for construction (assisted by state and federal grants), owns the sewage-treatment facilities to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally supervises the project. See 935 F. 2d, at 347 (citing Mass. Gen. Laws Ann., ch. 92 App., § 1-1 *et seq.* (1993). Mass. Gen. Laws §§ 149:44A to 149:44I, and 30:39M (1990)).

In the spring of 1988, MWRA selected Kaiser Engineers, Inc., as its project manager. Kaiser was to be primarily in charge of managing and supervising construction activity. Kaiser also was to advise MWRA on the development of a labor-relations policy that would maintain worksite harmony, labor-management peace, and overall stability throughout the duration of the project. To that end, Kaiser suggested to MWRA that Kaiser be permitted to negotiate an agreement with the Building and Construction Trades Council and affiliated organizations (BCTC) that would assure labor stability over the life of the project. App. to Pet. for Cert. in No. 91-274, p. 75a (MWRA Pet. App.). MWRA accepted Kaiser's suggestion, and Kaiser accordingly proceeded to negotiate the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (Agreement). *Ibid.* The Agreement included: recognition of BCTC as the exclusive bargaining agent for all craft employees; use of specified methods for resolving all labor-related disputes; a requirement that all employees be subject to union-security provisions compelling them to become union members within seven days of their employment; the primary use of BCTC's hiring halls to supply the project's craft labor force; a 10-year no-strike commitment; and a requirement that all contractors and subcontractors agree to be bound by the Agreement. 935 F. 2d, at 348. See generally MWRA Pet. App. 107a (full text of Agreement). MWRA's board of directors approved and adopted the Agreement in May 1989 and directed that Bid Specification 13.1 be incorporated into its solicitation of bids for work on the project.[1] 935 F. 2d, at 347. Bid Specification 13.1 provides in pertinent part:

> "[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser . . . on behalf of [MWRA] and [BCTC] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract." MWRA Pet. App. 141a–142a.

In March 1990, a contractors' association not a party to this litigation filed a charge with the National Labor Relations Board (NLRB) contending that the Agreement violated the NLRA. The NLRB General Counsel refused to issue a complaint, finding: (1) that the Agreement is a valid prehire agreement under § 8(f) of the NLRA, 29 U. S. C. § 158(f), which authorizes such agreements in the construction industry; and (2) that the Agreement's provisions limiting work on the project to contractors who agree to abide by the Agreement are lawful under the construction-industry proviso to § 8(e), 29 U. S. C. § 158(e). This proviso sets forth an exception from § 8(e)'s prohibition against "hot cargo" agreements that require an employer to refrain from doing business with any person not agreeing to be bound by a prehire agreement. *Building & Trades Council (Kaiser Engineers, Inc.)*, Case 1–CE–71, NLRB Advice Memo, June 25, 1990, MWRA Pet. App. 88a.

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[1] Massachusetts competitive-bidding laws require MWRA to state its preference for a contract term, such as a project labor agreement, in the form of a bid specification. These laws, which MWRA's Enabling Act explicitly incorporates, see Mass. Gen. Laws Ann., ch. 92 App., § 1–8(g) (1993) (incorporating Mass. Gen. Laws §§ 30:39M, and 149:44A to 149:44H), require that the competitive-bidding process be carried out by the awarding authority. See *Modern Continental Constr. Co.* v. *Lowell,* 391 Mass. 829, 836, 465 N. E. 2d 1173, 1177–1178 (1984).

Also in March 1990, respondent Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. (ABC), an organization representing nonunion construction-industry employers, brought this suit against MWRA, Kaiser, and BCTC, seeking, among other things, to enjoin enforcement of Bid Specification 13.1. ABC alleged pre-emption under the NLRA, pre-emption under § 514(c) of the Employee Retirement Income Security Act of 1974, 88 Stat. 897, 29 U. S. C. § 1144(c) (ERISA), violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, conspiracy to reduce competition in violation of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and various state-law claims. Only NLRA pre-emption is at issue here.

The United States District Court for the District of Massachusetts rejected each of ABC's claims and denied its motion for a preliminary injunction. MWRA Pet. App. 76a–83a. The Court of Appeals for the First Circuit reversed and directed entry of a preliminary injunction restraining the use of Bid Specification 13.1, reaching only the issue of NLRA pre-emption. 135 LRRM 2713 (1990). The Court of Appeals subsequently granted a petition for rehearing en banc, vacating the panel opinion. MWRA Pet. App. 84a. Upon rehearing en banc, the Court of Appeals, by a 3-to-2 vote, again reversed the judgment of the District Court, once more reaching only the pre-emption issue. 935 F. 2d, at 359–360. The court held that MWRA's intrusion into the bargaining process was pervasive and not the sort of peripheral regulation that would be permissible under *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). See 935 F. 2d, at 353. It also held that Bid Specification 13.1 was pre-empted under *Machinists* v. *Wisconsin Employment Relations Comm'n,* 427 U. S. 132 (1976), because MWRA was regulating activities that Congress intended to be unrestricted by governmental power. Because of the importance of the issue, we granted certiorari, 504 U. S. 908 (1992).

II

The NLRA contains no express pre-emption provision. Therefore, in accordance with settled pre-emption principles, we should not find MWRA's bid specification pre-empted "'"unless it conflicts with federal law or would frustrate the federal scheme, or unless [we] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."'" *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S. 724, 747–748 (1985) (citations omitted). We are reluctant to infer pre-emption. See *Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 516 (1992); *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana,* 451 U. S. 725, 746 (1981). With these general principles in mind, we turn to the particular pre-emption doctrines that have developed around the NLRA.

In *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S., at 748, we noted: "The Court has articulated two distinct NLRA pre-emption principles." The first, "*Garmon* pre-emption," see *San Diego Building Trades Council* v. *Garmon, supra,* forbids state and local regulation of activities that are "protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." 359 U. S., at 244. See also *Garner* v. *Teamsters,* 346 U. S. 485, 498–499 (1953) ("[W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent"). *Garmon* pre-emption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits. See *Wisconsin Dept. of Industry* v. *Gould Inc.*, 475 U. S. 282, 286 (1986). This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' "integrated scheme of regulation," *Garmon*, 359 U. S., at 247, embodied in §§7 and 8 of the NLRA, which includes the choice of the NLRB, rather than state or federal courts, as the appropriate body to implement the Act. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 748–749, and n. 26.

In *Garmon*, this Court held that a state court was precluded from awarding damages to employers for economic injuries resulting from peaceful picketing by labor unions that had not been selected by a majority of employees as their bargaining agent. 359 U. S., at 246. The Court said: "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." *Ibid.* In *Gould*, we held that the NLRA pre-empts a statute that disqualifies from doing business with the State persons who have violated the NLRA three times within a 5-year period. We emphasized there that "the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." 475 U. S., at 286 (citing 359 U. S., at 247).

A second pre-emption principle, "*Machinists* pre-emption," see *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S., at 147, prohibits state and municipal regulation of areas that have been left "'to be controlled by the free play of economic forces.'" *Id.*, at 140 (citation omitted). See also *Golden State Transit Corp.* v. *Los*

Angeles, 475 U. S. 608, 614 (1986) *(Golden State I); Golden State Transit Corp.* v. *Los Angeles,* 493 U. S. 103, 111 (1989) *(Golden State II). Machinists* pre-emption preserves Congress' "intentional balance '"between the uncontrolled power of management and labor to further their respective interests."'" *Golden State I,* 475 U. S., at 614 (citations omitted).

In *Machinists,* we held that the Wisconsin Employment Relations Commission could not designate as an unfair labor practice under state law a concerted refusal by a union and its members to work overtime, because Congress did not mean such self-help activity to be regulable by the States. 427 U. S., at 148–150. We said that it would frustrate Congress' intent to "sanction state regulation of such economic pressure deemed by the federal Act 'desirabl[y] . . . left for the free play of contending economic forces . . . .'" *Id.,* at 150 (citation omitted). In *Golden State I,* we applied the *Machinists* doctrine to hold that the city of Los Angeles was pre-empted from conditioning renewal of a taxicab operating license upon the settlement of a labor dispute. 475 U. S., at 618. We reiterated the principle that a "local government . . . lacks the authority to '"introduce some standard of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."'" *Id.,* at 619 (quoting *Machinists,* 427 U. S., at 149–150) (internal citation omitted). In *Golden State II, supra,* we determined that the taxicab employer who was challenging the city's conduct in *Golden State I* was entitled to maintain an action under 42 U. S. C. § 1983 for compensatory damages against the city. In so holding, we stated that the *Machinists* rule created a zone free from all regulations, whether state or federal. 493 U. S., at 112.

III

When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists,* or for NLRB jurisdiction, see *Garmon.* A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation.*

Our decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation,* not all legitimate state activity that affects labor. In *Machinists,* for example, we referred to Congress' pre-emptive intent to "leave some activities *unregulated,*" 427 U. S., at 144 (emphasis added), and held that the activities at issue—workers deciding together to refuse overtime work—were not "*regulable* by States," *id.,* at 149 (emphasis added). In *Golden State I,* we held that the reason Los Angeles could not condition renewal of a taxicab franchise upon settlement of a labor dispute was that "*Machinists* pre-emption . . . precludes state and municipal *regulation* 'concerning conduct that Congress intended to be *unregulated.*'" 475 U. S., at 614 (emphasis added) (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U. S., at 749). We refused to permit the city's exercise of its regulatory power of license nonrenewal to restrict Golden State's right to use lawful economic weapons in its dispute with its union. See 475 U. S., at 615–619. As petitioners point out, a very different case would have been presented had the city of Los Angeles purchased taxi services from Golden State in order to transport city employees. Brief for Petitioners 35. In that situation, if the strike had produced serious interruptions in the services the city had purchased, the city would not necessarily have been pre-empted from advising Golden State that it would hire another company if the labor dispute were not resolved and services resumed by a specific deadline.

In *Gould,* we rejected the argument that the State was acting as proprietor rather than regulator for purposes of *Garmon* pre-emption when the State refused to do business with persons who had violated the NLRA three times within five years. We noted in doing so that *in that case,* "debarment . . . serves plainly as a means of enforcing the NLRA." 475 U. S., at 287. We said there that "[t]he State concedes, as we think it must, that the point of the statute is to deter labor law violations"; we concluded that "[n]o other purpose could credibly be ascribed." *Ibid.*

Respondents quote the following passage from *Gould,* arguing that it stands for the proposition that the State as proprietor is subject to the same pre-emption limitations as the State as regulator:

> "Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties . . . . The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference . . . . The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play." *Id.,* at 290.

The above passage does not bear the weight that respondents would have it support. The conduct at issue in *Gould* was a state agency's attempt to compel conformity with the NLRA. Because the statute at issue in *Gould* addressed employer conduct unrelated to the employer's performance of contractual obligations to the State, and because the State's reason for such conduct was to deter NLRA violations, we concluded: "Wisconsin 'simply is not functioning as a private purchaser of services,' . . . [and therefore,] for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.*, at 289. We emphasized that we were "not say[ing] that state purchasing decisions may never be influenced by labor considerations." *Id.*, at 291.

The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. See *id.*, at 290. The private actor under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor. The fact that a private actor may "regulate" does not mean, of course, that the private actor may be "pre-empted" by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors therefore may "regulate" as they please, as long as their conduct does not violate the law. As the above passage in *Gould* makes clear, however, States have a qualitatively different role to play from private parties. *Ibid.* When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.

In *Gould,* we did not address fully the implications of these distinctions. We left open the question whether a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor and its acts therefore are not "tantamount to regulation" or policymaking. As explained more fully below, we now answer this question in the affirmative.

IV

Permitting the States to participate freely in the marketplace is not only consistent with NLRA pre-emption principles generally but also, in these cases, promotes the legislative goals that animated the passage of the §§ 8(e) and (f) exceptions for the construction industry. In 1959, Congress amended the NLRA to add § 8(f) and modify § 8(e). Section 8(f) explicitly permits employers in the construction industry—but no other employers—to enter into prehire agreements. Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees. 935 F. 2d, at 356; *Jim McNeff, Inc.* v. *Todd,* 461 U. S. 260, 265–266 (1983). The 1959 amendment adding a proviso to subsection (e) permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site unless they agree to become bound by the terms of that labor agreement. See *Woelke & Romero Framing, Inc.* v. *NLRB,* 456 U. S. 645, 657 (1982). Section 8(f) contains a final proviso that permits employees, once hired, to utilize the NLRB election process under §§ 9(c) and (e) of the Act, 29 U. S. C. §§ 159(c) and (e), if they wish to reject the bargaining representative or to cancel the union security provisions of the prehire agreement. See *NLRB* v. *Iron Workers,* 434 U. S. 335, 345 (1978).

It is undisputed that the Agreement between Kaiser and BCTC is a valid labor contract under §§ 8(e) and (f). As noted above, those sections explicitly authorize this type of contract between a union and an employer like Kaiser, which is engaged primarily in the construction industry, covering employees engaged in that industry.

Of course, the exceptions provided for the construction industry in §§ 8(e) and (f), like the prohibitions from which they provide relief, are not made specifically applicable to the State. This is because the State is excluded from the definition of the term "employer" under the NLRA, see 29 U. S. C. § 152(2), and because the State, in any event, is acting not as an employer but as a purchaser in this case. Nevertheless, the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections.

It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a longstanding custom of prehire bargaining in the industry. See S. Rep. No. 187, 86th Cong., 1st Sess., 28, 55–56 (1959); H. R. Rep. No. 741, 86th Cong., 1st Sess., 19–20 (1959).

There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction. See, *e. g., Maryland* v. *Louisiana,* 451 U. S., at 746 ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").[2] Indeed, there is some force to petitioners' argument, Brief for Petitioners 25, that denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists.*

V

In the instant case, MWRA acted on the advice of a manager hired to organize performance of a cleanup job over which, under Massachusetts law, MWRA is the proprietor. There is no question but that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost. As petitioners note, moreover, Brief for Petitioners 26, the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project. There is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry, incentives that this Court has recognized as legitimate. See *Woelke & Romero Framing Co.* v. *NLRB,* 456 U. S., at 662, and n. 14.

We hold today that Bid Specification 13.1 is not government regulation and that it is therefore subject to neither *Garmon* nor *Machinists* pre-emption. Bid Specification 13.1 constitutes proprietary conduct on the part of the Commonwealth of Massachusetts, which legally has enforced a valid project labor agreement. As Chief Judge Breyer aptly noted in his dissent in the Court of Appeals, "when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." 935 F. 2d, at 361.

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[2] Respondents suggest in their brief, Brief for Respondents 22, n. 12, that under *H. K. Porter Co.* v. *NLRB,* 397 U. S. 99, 103 (1970), § 8(d) of the NLRA expressly prohibits the conduct of MWRA at issue in this case. The Court of Appeals did not rely on this section of the statute, nor did we grant certiorari on this question. We therefore decline the invitation to address the application, if any, of § 8(d) to Bid Specification 13.1.

Because we find that Bid Specification 13.1 is not preempted by the NLRA, it follows that a preliminary injunction against enforcement of this bid specification was improper. We therefore reverse the judgment of the Court of Appeals and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

ORTEGA-RODRIGUEZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-7749. Argued December 7, 1992—Decided March 8, 1993

In *United States* v. *Holmes*, 680 F. 2d 1372, 1373, the Court of Appeals held that "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." Relying on that authority, and without further explanation, the court issued a *per curiam* order dismissing the appeal of petitioner, who failed to appear for sentencing following his conviction on federal narcotics charges, but was recaptured before he filed his appeal.

Held: When a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal. Pp. 239–252.

(a) This Court's settled rule that dismissal is an appropriate sanction when a convicted defendant is a fugitive during "the ongoing appellate process," see *Estelle* v. *Dorrough*, 420 U. S. 534, 542, n. 11, is amply supported by a number of justifications, including concerns about the enforceability of the appellate court's judgment against the fugitive, see, *e. g., Smith* v. *United States*, 94 U. S. 97; the belief that flight disentitles the fugitive to relief, see *Molinaro* v. *New Jersey*, 396 U. S. 365, 366; the desire to promote the "efficient . . . operation" of the appellate process and to protect the "digni[ty]" of the appellate court, see *Estelle*, 420 U. S., at 537; and the view that the threat of dismissal deters escapes, see *ibid.* Pp. 239–242.

(b) The foregoing rationales do not support a rule of dismissal for all appeals filed by former fugitives who are returned to custody before they invoke the jurisdiction of the appellate tribunal. These justifications all assume some connection between the defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. When both flight and recapture occur while a case is pending before the district court, the justifications are necessarily attenuated and often will not apply. Pp. 242–249.

(c) This Court does not hold that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal, since it is possible that some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction. As this case reaches the Court, however, there is no indication in the record that the Court of Appeals made such a judgment under the standard here announced. Application of the *Holmes* rule, as formulated by the lower court thus far, does not require the kind of connection between fugitivity and the appellate process that is necessary; instead it may rest on nothing more than the faulty premise that any act of judicial defiance, whether or not it affects the appellate process, is punishable by appellate dismissal. Pp. 249–252.

Vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which BLACKMUN, SCALIA, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE, O'CONNOR, and THOMAS, JJ., joined, *post*, p. 252.

James R. Gailey argued the cause for petitioner. With him on the briefs were *Stewart G. Abrams* and *Paul M. Rashkind.*

Amy L. Wax argued the cause for the United States. With her on the brief were *Solicitor General Starr, Assistant Attorney General Mueller,* and *Deputy Solicitor General Bryson.*

JUSTICE STEVENS delivered the opinion of the Court.

In *United States* v. *Holmes*, 680 F. 2d 1372, 1373 (1982), cert. denied, 460 U. S. 1015 (1983), the Court of Appeals for the Eleventh Circuit held that "a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control." Relying on that authority, and without further explanation, the court dismissed petitioner's appeal.[1] Because we have not previously considered whether a defendant may be deemed to forfeit his right to appeal by fleeing while his case is pending in the district court, though he is recaptured before sentencing and appeal, we granted certiorari. 504 U. S. 984 (1992).

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[1] The Court of Appeals order merely stated that the Government's "motion to dismiss is GRANTED," without actually citing *Holmes.* App. 78. Because the Government's motion to dismiss, *id.*, at 68–71, relied entirely on *Holmes* and on *United States* v. *London,* 723 F. 2d 1538 (CA11), cert. denied, 467 U. S. 1228 (1984), which followed *Holmes,* we construe the Court of Appeals order as a routine application of the *Holmes* rule.

I

In the early evening of November 7, 1988, a Customs Service pilot was patrolling the Cay Sal Bank area, located midway between Cuba and the Florida Keys. Approximately 30 miles southwest of Cay Sal, the pilot observed a low-flying aircraft circling over a white boat and dropping bales. The boat, described by the pilot as 40 to 50 feet in length, was circling with the plane and retrieving the bales from the water as they dropped. Because the Customs Service plane was flying at an altitude of 2,500 feet, and visibility was less than optimal, the pilot was unable to identify the name of the boat. *United States* v. *Mieres-Borges*, 919 F. 2d 652, 654–655 (CA11 1990), cert. denied, 499 U. S. 980 (1991); Report and Recommendation in *United States* v. *Ortega-Rodriguez*, No. 88–10035–CR–KING (SD Fla., Feb. 23, 1989).

The following morning, another Customs Service pilot found the *Wilfred*, a boat resembling the one spotted approximately 12 hours earlier. This boat, located just off the beach of Cay Sal, was described as a 30- to 40-foot sportfishing vessel. Upon making this discovery, the pilot first flew to the drop point identified the night before, 30 miles away, and found no activity. Returning to Cay Sal, he found a number of bales stacked on the beach, and the *Wilfred* underway and headed toward Cuba.

The pilot alerted the captain of a Coast Guard cutter, who intercepted, boarded, and searched the *Wilfred*. He found no narcotics, weapons, or other incriminating evidence on the boat. Nevertheless, the three members of the crew failed to convince the Coast Guard that they were fishing for dolphin, although a large number of similar vessels frequently do so in the area. *Mieres-Borges*, 919 F. 2d, at 655–657, 659–660.

Petitioner is one of the three crew members arrested, tried, and convicted of possession with intent to distribute, and conspiring to possess with intent to distribute, over five kilograms of cocaine. After the trial, the District Court set June 15, 1989, as the date for sentencing. Petitioner did not appear and was sentenced *in absentia* to a prison term of 19 years and 7 months, to be followed by 5 years of supervised release.[2] Though petitioner's codefendants appealed their convictions and sentences, no appeal from the judgment was filed on petitioner's behalf.

The District Court issued a warrant for petitioner's arrest, and 11 months later, on May 24, 1990, he was apprehended. Petitioner was indicted and found guilty of contempt of court[3] and failure to appear.[4] Pursuant to the Sentencing

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[2] No. 88–10035–CR–KING (SD Fla., June 23, 1989).

[3] Title 18 U. S. C. § 401(3) provides: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command."

[4] Title 18 U. S. C. § 3146 provides, in relevant part:

"(a) OFFENSE.—Whoever, having been released under this chapter knowingly—

"(1) fails to appear before a court as required by the conditions of release; or

"(2) fails to surrender for service of sentence pursuant to a court order; shall be punished as provided in subsection (b) of this section.

"(b) PUNISHMENT.—(1) The punishment for an offense under this section is—

"(A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for—

"(i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title or imprisonment for not more than ten years, or both;

"(ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;

"(iii) any other felony, a fine under this title or imprisonment for not more than two years, or both; or

Reform Act of 1984, 18 U. S. C. § 3551 *et seq.*, the District Court imposed a prison sentence of 21 months, to be served after the completion of the sentence on the cocaine offenses and to be followed by a 3-year term of supervised release.[5]

While petitioner was under indictment after his arrest, the Court of Appeals disposed of his two codefendants' appeals. The court affirmed one conviction, but reversed the other because the evidence was insufficient to establish guilt beyond a reasonable doubt.[6] Also after petitioner was taken into custody, his attorney filed a "motion to vacate sentence and for resentencing," as well as a motion for judgment of acquittal. The District Court denied the latter but granted the former, vacating the judgment previously entered on the cocaine convictions.[7] The District Court then resentenced

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"(iv) a misdemeanor, a fine under this chapter or imprisonment for not more than one year, or both; and

"(B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both.

"(2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist."

[5] App. 58–63.

[6] *United States* v. *Mieres-Borges*, 919 F. 2d 652 (CA11 1990), cert. denied, 499 U. S. 980 (1991). The difference in dispositions is explained by a post-arrest statement admitted against only one defendant, 919 F. 2d., at 660–661, though the dissenting judge viewed the evidence as insufficient as to both appealing defendants, *id.*, at 663–664. Petitioner represents that he is situated identically to the codefendant whose conviction was reversed, with nothing in the record that would support a distinction between their cases. The Government does not take issue with that representation, but maintains that the evidence is sufficient to support all three convictions. Brief for United States 28, n. 7.

[7] App. 10.

petitioner to a prison term of 15 years and 8 months, to be followed by a 5-year period of supervised release.[8] Petitioner filed a timely appeal from that final judgment.[9]

On appeal, petitioner argued that the same insufficiency of the evidence rationale underlying reversal of his codefendant's conviction should apply in his case, because precisely the same evidence was admitted against the two defendants. Without addressing the merits of this contention, the Government moved to dismiss the appeal. The Government's motion was based entirely on the fact that petitioner had become a fugitive after his conviction and before his initial sentencing, so that "[u]nder the holding in *Holmes,* he cannot now challenge his 1989 conviction for conspiracy and possession with intent to distribute cocaine."[10] In a *per curiam* order, the Court of Appeals granted the motion to dismiss.

II

It has been settled for well over a century that an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal. The Supreme Court applied this rule for the first time in *Smith* v. *United States,* 94 U. S. 97 (1876), to an escaped defendant who remained at large when his petition arose before the Court. Under these circumstances, the Court explained, there could be no assurance that any judgment it issued would prove enforceable. The Court concluded that it is "clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." *Ibid.* On two subsequent occasions, we gave the same rationale for dismissals based on the fugitive status of defendants while their cases were pending before our Court. *Bohanan* v. *Nebraska,* 125 U. S. 692 (1887); *Eisler* v. *United States,* 338 U. S. 189 (1949).[11]

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[8] *Id.,* at 51–56.

[9] *Id.,* at 57. This sequence of events makes petitioner's case somewhat unusual. Had the District Court denied petitioner's motion for resentencing, petitioner would have been barred by applicable time limits from appealing his initial sentence and judgment. Petitioner was able to file a timely appeal only because the District Court granted his motion to resentence. Entry of the second sentence and judgment, from which petitioner noticed his appeal, is treated as the relevant "sentencing" for purposes of this opinion. We have no occasion here to comment on the propriety of either the District Court's initial decision to sentence *in absentia,* or its subsequent decision to resentence.

[10] *Id.,* at 70–71.

Enforceability is not, however, the only explanation we have offered for the fugitive dismissal rule. In *Molinaro* v. *New Jersey,* 396 U. S. 365, 366 (1970), we identified an additional justification for dismissal of an escaped prisoner's pending appeal:

> "No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims."

As applied by this Court, then, the rule allowing dismissal of fugitives' appeals has rested in part on enforceability concerns, and in part on a "disentitlement" theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment.

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[11] The dissenting Justices in *Eisler,* noting that the case was not rendered moot by Eisler's escape, believed that the Court should have exercised its discretion to decide the merits in light of the importance of the issue presented. See 338 U. S., at 194 (Murphy, J., dissenting); *id.,* at 195 (Jackson, J., dissenting). In *United States* v. *Sharpe,* 470 U. S. 675 (1985), despite the respondent's fugitive status, the Court declined to remand the case to the Court of Appeals with directions to dismiss, and proceeded to decide the merits. *Id.,* at 681, n. 2. See also *id.,* at 688 (BLACKMUN, J., concurring); *id.,* at 721–723 (STEVENS, J., dissenting).

That ensuring enforceability is not the sole rationale for fugitive dismissals is also evident from our review of state provisions regarding escaped prisoners' pending appeals. In *Allen* v. *Georgia*, 166 U. S. 138 (1897), we upheld not only a state court's dismissal of a fugitive's appeal, but also its refusal to reinstate the appeal after the defendant's recapture, when enforceability would no longer be at issue. We followed *Allen* in *Estelle* v. *Dorrough*, 420 U. S. 534 (1975), upholding the constitutionality of a Texas statute providing for automatic appellate dismissal when a defendant escapes during the pendency of his appeal, unless the defendant voluntarily returns within 10 days. Although the defendant in *Estelle* had been recaptured before his appeal was considered and dismissed, resolving any enforceability problems, there were, we held, other reasons for dismissal. Referring to our own dismissal in *Molinaro*, we found that the state statute served "similar ends . . . . It discourages the felony of escape and encourages voluntary surrenders. It promotes the efficient, dignified operation of the Texas Court of Criminal Appeals." 420 U. S., at 537 (footnotes omitted).

Estelle went on to consider whether the Texas statute was irrational because it applied only to prisoners with appeals pending when they fled custody. Citing the "peculiar problems posed by escape of a prisoner during the ongoing appellate process," *id.*, at 542, n. 11, we concluded that it was not. The distinct concerns implicated by an escape pending appeal justified a special rule for such appeals:

> "Texas was free to deal more severely with those who simultaneously invoked the appellate process and escaped from its custody than with those who first escaped from its custody, returned, and then invoked the appellate process within the time permitted by law. While each class of prisoners sought to escape, the first did so in the very midst of their invocation of the appellate process, while the latter did so before returning to custody and commencing that process. If Texas is free to

> adopt a policy which deters escapes by prisoners, as all of our cases make clear that it is, it is likewise free to impose more severe sanctions on those whose escape is reasonably calculated to disrupt the very appellate process which they themselves have set in motion." *Id.*, at 541–542.

Thus, our cases consistently and unequivocally approve dismissal as an appropriate sanction when a prisoner is a fugitive during "the ongoing appellate process." Moreover, this rule is amply supported by a number of justifications. In addition to addressing the enforceability concerns identified in *Smith* v. *United States*, 94 U. S. 97 (1876), and *Bohanan* v. *Nebraska*, 125 U. S. 692 (1887), dismissal by an appellate court after a defendant has fled its jurisdiction serves an important deterrent function and advances an interest in efficient, dignified appellate practice. *Estelle*, 420 U. S., at 537. What remains for our consideration is whether the same rationales support a rule mandating dismissal of an appeal of a defendant who flees the jurisdiction of a district court, and is recaptured before he invokes the jurisdiction of the appellate tribunal.

III

In 1982, the Government persuaded the Eleventh Circuit that our reasoning in *Molinaro* should be extended to the appeal of a "former fugitive," returned to custody prior to sentencing and notice of appeal.[12] The Court of Appeals recognized in *Holmes* that all of the cases on which the Government relied were distinguishable, "because each involved a defendant who fled *after* filing a notice of appeal." 680 F. 2d, at 1373 (emphasis added). The court was satisfied, however, that the disentitlement rationale of *Molinaro* "is equally forceful whether the defendant flees before or after sentencing." 680 F. 2d, at 1374. The Eleventh Circuit also expressed concern that absent dismissal, the Government might be prejudiced by delays in proceedings resulting from presentencing escapes.[13]

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[12] For present purposes, the time of sentencing and the time of appeal may be treated together, as the two dates normally must occur within 10 days of one another. See Fed. Rule App. Proc. 4(b); see also n. 9, *supra; Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312, 314–315 (1988) (discussing mandatory nature of Rule 4 time limits). Cases in which a defendant flees during that 10-day interval will be resolved easily: If the defendant fails to file a timely appeal, his case concludes; if the defendant's attorney files an appeal for him in his absence, the appeal will be subject to dismissal under straightforward application of *Smith* and *Molinaro*. Should a defendant flee after sentencing but return before appeal—in other words,

The rule of *Holmes* differs from that applied in *Molinaro* in three key respects. First, of course, the *Holmes* rule reaches defendants who flee while their cases are before district courts, as well as those who flee while their appeals are pending. Second, the *Holmes* rule, unlike the rule of *Molinaro,* will not mandate dismissal of an entire appeal whenever it is invoked. As the Eleventh Circuit explained, because flight cannot fairly be construed as a waiver of appeal from errors occurring after recapture, defendants who flee presentencing retain their right to appeal *sentencing* errors, though they lose the right to appeal their *convictions.* 680 F. 2d, at 1373.[14] Finally, as announced in *Holmes* and

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should his period of fugitivity begin after sentencing and end less than 10 days later—then a timely filed appeal would be subject to the principles we apply today.

[13] The court reasoned that the right of appeal, purely a creature of statute, may be waived by failure to file a timely notice of appeal "or by abandonment through flight which may postpone filing a notice of appeal for years after conviction." *Holmes,* 680 F. 2d, at 1373–1374. The court then explained: "Such untimeliness would make a meaningful appeal impossible in many cases. In case of a reversal, the government would obviously be prejudiced in locating witnesses and retrying the case." *Id.,* at 1374.

[14] "We hold that a defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control. *Such a defendant does not waive his right to appeal from any alleged errors connected to his sentencing.*" *Id.,* at 1373 (emphasis added).

applied in this case, the Eleventh Circuit rule appears to call for automatic dismissal, rather than an exercise of discretion. See n. 11, *supra.*

In our view, the rationales that supported dismissal in cases like *Molinaro* and *Estelle* should not be extended as far as the Eleventh Circuit has taken them. Our review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope, but it does demand that such rules represent reasoned exercises of the courts' authority. See *Thomas* v. *Arn,* 474 U. S. 140, 146–148 (1985). Accordingly, the justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response.[15] These justifications are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the district court, so that a defendant's fugitive status at no time coincides with his appeal.

There is, for instance, no question but that dismissal of a former fugitive's appeal cannot be justified by reference to the enforceability concerns that animated *Smith* v. *United States,* 94 U. S. 97 (1876), and the cases that followed. A defendant returned to custody before he invokes the appellate process presents no risk of unenforceability; he is within control of the appellate court throughout the period of appeal and issuance of judgment. Cf. *United States* v. *Gordon,* 538 F. 2d 914, 915 (CA1 1976) (dismissing pending appeal of fugitive because it is "unlikely that [the] convicted party will respond to an unfavorable decision").

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[15] The reasonableness standard of *Thomas* v. *Arn,* 474 U. S. 140 (1985), is not, however, the only reason we require some connection between the appellate process and an appellate sanction. As the dissent notes, *post,* at 254, n. 2, Federal Rule of Appellate Procedure 47, which authorizes the promulgation of rules by the courts of appeals, limits that authority to rules "governing [the] practice" before those courts.

Similarly, in many cases, the "efficient . . . operation" of the appellate process, identified as an independent concern in *Estelle*, 420 U. S., at 537, will not be advanced by dismissal of appeals filed after former fugitives are recaptured. It is true that an escape may give rise to a "flurry of extraneous matters," requiring that a court divert its attention from the merits of the case before it. *United States* v. *Puzzanghera*, 820 F. 2d 25, 26 (CA1), cert. denied, 484 U. S. 900 (1987). The court put to this "additional trouble," 820 F. 2d, at 26, however, at least in the usual course of events, will be the court before which the case is pending at the time of escape. When an appeal is filed after recapture, the "flurry," along with any concomitant delay, likely will exhaust itself well before the appellate tribunal enters the picture.[16]

Nor does dismissal of appeals filed after recapture operate to protect the "digni[ty]" of an appellate court. Cf. *Estelle*, 420 U. S., at 537. It is often said that a fugitive "flouts" the authority of the court by escaping, and that dismissal is an appropriate sanction for this act of disrespect. See, *e. g., United States* v. *DeValle*, 894 F. 2d 133, 138 (CA5 1990); *United States* v. *Persico*, 853 F. 2d 134, 137–138 (CA2 1988);

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[16] This case well illustrates the way in which preappeal flight may delay district court, but not appellate court, proceedings. Petitioner's sentencing was scheduled for June 1989. Because he fled, however, and because the District Court resentenced him upon his return to custody, his final sentence was not entered until January 1991. *Supra*, at 237–238. Accordingly, petitioner's 11-month period of fugitivity delayed culmination of the *District* Court proceedings by as much as 19 months.

In the appellate court, on the other hand, the timing of proceedings was unaffected by petitioner's flight. Had petitioner filed his notice of appeal before he fled, of course, then the Court of Appeals might have been required to reschedule an already docketed appeal, causing some delay. But here, petitioner filed his notice of appeal only after he was returned to custody, and the Court of Appeals was therefore free to docket his case pursuant to its regular schedule and at its convenience. In short, a lapse of time that precedes invocation of the appellate process does not translate, by itself, into delay borne by the appellate court.

Ali v. *Sims,* 788 F. 2d 954, 958–959 (CA3 1986); *United States* v. *London,* 723 F. 2d 1538, 1539 (CA11), cert. denied, 467 U. S. 1228 (1984). Indeed, the premise of *Molinaro's* disentitlement theory is that "the fugitive from justice has demonstrated such disrespect for the legal processes that he has no right to call upon the court to adjudicate his claim." *Ali* v. *Sims,* 788 F. 2d, at 959; see *Molinaro,* 396 U. S., at 366. We have no reason here to question the proposition that an appellate court may employ dismissal as a sanction when a defendant's flight operates as an affront to the dignity of the court's proceedings.

The problem in this case, of course, is that petitioner, who fled before sentencing and was recaptured before appeal, flouted the authority of the District Court, not the Court of Appeals. The contemptuous disrespect manifested by his flight was directed at the District Court, before which his case was pending during the entirety of his fugitive period. Therefore, under the reasoning of the cases cited above, it is the District Court that has the authority to defend its own dignity, by sanctioning an act of defiance that occurred solely within its domain. See *United States* v. *Anagnos,* 853 F. 2d 1, 2 (CA1 1988) (declining to follow *Holmes* because former fugitive's "misconduct was in the district court, and should affect consequences in that court, not in ours").

We cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings. See *supra,* at 244, and n. 15. Such a rule would sweep far too broadly, permitting, for instance, this Court to dismiss a petition solely because the petitioner absconded for a day during district court proceedings, or even because the petitioner once violated a condition of parole or probation. None of our cases calls for such a result, and we decline today to adopt such an approach.[17] Accordingly, to the extent that the *Holmes* rule rests on the premise that *Molinaro*'s disentitlement theory by itself justifies dismissal of an appeal filed after a former fugitive is returned to custody, see 680 F. 2d, at 1374, it cannot be sustained.

Finally, *Estelle*'s deterrence rationale, 420 U. S., at 537, offers little support for the Eleventh Circuit rule. Once jurisdiction has vested in the appellate court, as in *Estelle*, then any deterrent to escape must flow from appellate consequences, and dismissal may be an appropriate sanction by which to deter. Until that time, however, the district court is quite capable of defending its own jurisdiction. While a case is pending before the district court, flight can be deterred with the threat of a wide range of penalties available to the district court judge. See *Katz* v. *United States*, 920 F. 2d 610, 613 (CA9 1990) (when defendant is before district court, "disentitlement doctrine does not stand alone as a deterrence to escape").

Moreover, should this deterrent prove ineffective, and a defendant flee while his case is before a district court, the district court is well situated to impose an appropriate punishment. While an appellate court has access only to the blunderbuss of dismissal, the district court can tailor a more finely calibrated response. Most obviously, because flight is a separate offense punishable under the Criminal Code, see nn. 3–4, *supra*, the district court can impose a separate sentence that adequately vindicates the public interest in deterring escape and safeguards the dignity of the court. In this case, for instance, the District Court concluded that a term of imprisonment of 21 months, followed by three years of supervised release, would serve these purposes.[18] If we assume that there is merit to petitioner's appeal, then the Eleventh Circuit's dismissal is tantamount to an additional punishment of 15 years for the same offense of flight. Cf. *United States* v. *Snow,* 748 F. 2d 928 (CA4 1984).[19] Our reasoning in *Molinaro* surely does not compel that result.

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[17] Even the Eleventh Circuit, we note, seems unprepared to take such an extreme position. If appellate dismissal were indeed an appropriate sanction for all acts of judicial defiance, then there would be no reason to exempt sentencing errors from the scope of the *Holmes* rule. See 680 F. 2d, at 1373; *supra*, at 243. Whether or not *Holmes*' distinction between appeals from sentencing errors and appeals from convictions is logically supportable, see *United States* v. *Anagnos*, 853 F. 2d 1, 2 (CA1 1988) (questioning logic of distinction), it reflects an acknowledgment by the Eleventh Circuit that the sanction of appellate dismissal should not be wielded indiscriminately as an all-purpose weapon against defendant misconduct.

Indeed, as Justice Stewart noted in his dissenting opinion in *Estelle* v. *Dorrough,* 420 U. S., at 544–545, punishment by appellate dismissal introduces an element of arbitrariness and irrationality into sentencing for escape.[20] Use of the dismissal sanction as, in practical effect, a second punishment for a defendant's flight is almost certain to produce the kind of disparity in sentencing that the Sentencing Reform Act of 1984[21] and the Sentencing Guidelines were intended to eliminate.[22]

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[18] See *supra,* at 237–238.

[19] "The Court is not condoning [defendant's] flight from justice. However, it presumes his actions constitute an independent crime, *i. e.,* 'escape from custody.' We refrain from punishing [defendant] twice by dismissing his appeal." *United States* v. *Snow,* 748 F. 2d, at 930, n. 3.

[20] "[T]he statute imposes totally irrational punishments upon those subject to its application. If an escaped felon has been convicted in violation of law, the loss of his right to appeal results in his serving a sentence that under law was erroneously imposed. If, on the other hand, his trial was free of reversible error, the loss of his right to appeal results in no punishment at all. And those whose appeals would have been reversed if their appeals had not been dismissed serve totally disparate sentences, dependent not upon the circumstances of their escape, but upon whatever sentences may have been meted out under their invalid convictions." *Estelle,* 420 U. S., at 544.

[21] 18 U. S. C. § 3551 *et seq.;* 28 U. S. C. §§ 991–998.

[22] See generally *Mistretta* v. *United States,* 488 U. S. 361 (1989) (discussing purpose of Sentencing Reform Act and Sentencing Guidelines).

The dissent relies heavily on the legitimate interests in avoiding the "specter of inconsistent judgments," as well as in preserving "precious appellate resources." *Post,* at 255. It must be remembered, however, that the reason appellate resources are precious is that they serve the

Accordingly, we conclude that while dismissal of an appeal pending while the defendant is a fugitive may serve substantial interests, the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, as provided when a defendant is at large during "the ongoing appellate process," *Estelle*, 420 U. S., at 542, n. 11, the justifications advanced for dismissal of fugitives' pending appeals generally will not apply.

We do not ignore the possibility that some actions by a defendant, though they occur while his case is before the district court, might have an impact on the appellate process sufficient to warrant an appellate sanction. For that reason, we do not hold that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal. For example, the Eleventh Circuit, in formulating the *Holmes* rule, expressed concern that a long escape, even if ended before sentencing and appeal, may so delay the onset of appellate proceedings that the Government would be prejudiced in locating witnesses and presenting evidence at retrial after a successful appeal. *Holmes*, 680 F. 2d, at 1374; see also *United States* v. *Persico*, 853 F. 2d, at 137. We recognize that this problem might, in some instances, make dismissal an appropriate response. In the class of appeals premised on insufficiency of the evidence, however, in which petitioner's appeal falls, retrial is not permitted in the event of reversal, and this type of prejudice to the Government will not serve as a rationale for dismissal.

Similarly, a defendant's misconduct at the district court level might somehow make "meaningful appeal impossible," *Holmes*, 680 F. 2d, at 1374, or otherwise disrupt the appellate process so that an appellate sanction is reasonably imposed.

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purpose of administering evenhanded justice. In this case, it is the dissent's proposed disposition that would produce inconsistent judgments, as petitioner served a 15-year sentence while his codefendant's conviction was reversed for insufficiency of evidence.

The appellate courts retain the authority to deal with such cases, or classes of cases,[23] as necessary. Here, for instance, petitioner's flight prevented the Court of Appeals from consolidating his appeal with those of his codefendants, which we assume would be its normal practice. See *United States* v. *Mieres-Borges*, 919 F. 2d, at 654, n. 1 (noting that petitioner is absent and not party to appeal). If the Eleventh Circuit deems this consequence of petitioner's flight a significant interference with the operation of its appellate process, then, under the reasoning we employ today, a dismissal rule could properly be applied.

As this case reaches us, however, there is no reason to believe that the Eleventh Circuit has made such a judgment. Application of the *Holmes* rule, as formulated by the Eleventh Circuit thus far, does not require the kind of connection between fugitivity and the appellate process that we hold necessary today; instead, it may rest on nothing more than the faulty premise that any act of judicial defiance, whether or not it affects the appellate process, is punishable by appellate dismissal. See *Holmes*, 680 F. 2d, at 1374; *supra*, at 246. Accordingly, that the Eleventh Circuit saw fit to dismiss this case under *Holmes* does not by itself reflect a determination that dismissal would be appropriate under the narrower circumstances we now define.

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[23] We cannot agree with petitioner that the courts may only consider whether to dismiss the appeal of a former fugitive on an individual, case-specific basis. Though dismissal of fugitive appeals is always discretionary, in the sense that fugitivity does not "strip the case of its character as an adjudicable case or controversy," *Molinaro* v. *New Jersey*, 396 U. S. 365, 366 (1970); see also n. 11, *supra*, appellate courts may exercise that discretion by developing generally applicable rules to cover specific, recurring situations. Indeed, this Court itself has formulated a general rule allowing for dismissal of petitions that come before it while the petitioner is at large. See *Smith* v. *United States*, 94 U. S. 97 (1876). The problem with the *Holmes* rule is not that the appeals it reaches are subject to automatic dismissal, but that it reaches too many appeals—including those of defendants whose former fugitive status in no way affects the appellate process.

Nor is there any indication in the record below—either in the Government's motion to dismiss, or in the Eleventh Circuit's *per curiam* order—that petitioner's former fugitivity was deemed to present an obstacle to orderly appellate review. Thus, we have no reason to assume that the Eleventh Circuit would consider the duplication of resources involved in hearing petitioner's appeal separately from those of his codefendants—which can of course be minimized by reliance on the earlier panel decision in *United States* v. *Mieres-Borges*, see *supra*, at 238, and n. 6—sufficiently disruptive of the appellate process that dismissal would be a reasonable response, on the facts of this case and under the standard we announce today. We leave that determination to the Court of Appeals on remand.[24]

In short, when a defendant's flight and recapture occur before appeal, the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal. In such cases, fugitivity while a case is pending before a district court, like other contempts of court, is best sanctioned by the district court itself. The contempt for the appellate process manifested by flight while a case is pending on appeal remains subject to the rule of *Molinaro*.

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[24] Neither the reasonableness standard of *Thomas* v. *Arn*, 474 U. S. 140 (1985), nor Federal Rule of Appellate Procedure 47, mandates uniformity among the circuits in their approach to fugitive dismissal rules. See *Thomas*, 474 U. S., at 157 (STEVENS, J., dissenting). In other words, so long as all circuit rules meet the threshold reasonableness requirement, in that they mandate dismissal only when fugitivity has some connection to the appellate process, they may vary considerably in their operation. For this additional reason, we hesitate to decide as a general matter whether and under what circumstances preappeal flight that leads to severance of codefendants' appeals will warrant appellate dismissal, and instead leave that question to the various courts of appeals.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE THOMAS join, dissenting.

The Court holds that, in general, a court of appeals may not dismiss an appeal based on a defendant's fugitive status if that status does not coincide with the pendency of the appeal. We disagree. The only difference between a defendant who absconds preappeal and one who absconds postappeal is that the former has filed a notice of appeal while the latter has not. This "distinction" is not strong enough to support the Court's holding, for there is as much of a chance that flight will disrupt the proper functioning of the appellate process if it occurs before the court of appeals obtains jurisdiction as there is if it occurs after the court of appeals obtains jurisdiction. As a consequence, there is no reason why the authority to dismiss an appeal should be based on the timing of a defendant's escape. Although we agree with the Court that there must be some "connection" between escape and the appellate process, we disagree with the conclusion that recapture before appeal generally breaks the connection.[1]

It is beyond dispute that the courts of appeals have supervisory power to create and enforce "procedural rules governing the management of litigation." *Thomas* v. *Arn,* 474

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[1] The Court erroneously strikes the *Holmes* rule on the basis that "it reaches too many appeals," *ante,* at 250, n. 23, because there is no overbreadth doctrine applicable in this context. See *Broadrick* v. *Oklahoma,* 413 U. S. 601, 610–611 (1973) (overbreadth doctrine is the exception rather than the rule because "courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws"). As long as the fugitive dismissal rule was applied legally to the facts of this case, the Eleventh Circuit's rule cannot be struck down. It is for this reason that we would affirm the Eleventh Circuit rather than vacating and remanding.

U. S. 140, 146 (1985). The only limit on this authority is that the rules may not violate the Constitution or a statute, and must be reasonable in light of the concerns they are designed to address. See *id.*, at 146–148. There can be no argument that the fugitive dismissal rule employed by the Eleventh Circuit violates the Constitution because a convicted criminal has no constitutional right to an appeal. *Abney* v. *United States*, 431 U. S. 651, 656 (1977). Nor is the rule inconsistent with 28 U. S. C. § 1291, which grants to criminal defendants the right of appeal, because that section does not set forth the procedural requirements for perfecting an appeal. Those requirements are set forth in the Federal Rules of Appellate Procedure and the local rules of the courts of appeals. Indeed, under Federal Rule of Appellate Procedure 47, each court of appeals has authority to make rules "governing its practice" either through rulemaking or adjudication.

The fugitive dismissal rule is reasonable in light of the interests it is designed to protect. In *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970), we declined to adjudicate a defendant's case because he fled after appealing his state conviction. We reasoned that by absconding, the defendant forfeited his right to "call upon the resources of the Court for determination of his claims." *Id.*, at 366. And in *Estelle* v. *Dorrough*, 420 U. S. 534 (1975), we upheld a Texas statute that mandated dismissal of an appeal if the defendant fled after invoking the jurisdiction of the appellate court. We recognized that Texas reasonably has an interest in discouraging felony escape, encouraging voluntary surrenders, and promoting the "efficient, dignified operation of the Texas Court of Criminal Appeals." *Id.*, at 537. Both *Molinaro* and *Estelle* are premised on the idea that a reviewing court may invoke procedural rules to protect its jurisdiction and to ensure the orderly and efficient use of its limited resources.

While we agree with the Court that there must be some connection between fugitivity and the appellate process in order to justify a rule providing for dismissal on that basis, we do not agree that flight generally does not have the required connection simply because it occurs before the defendant or his counsel files a notice of appeal.[2] It is fallacious to suggest that a defendant's actions in fleeing likely will have no effect upon the appellate process unless those actions occur while the court of appeals has jurisdiction over the case. Indeed, flight during the pendency of an appeal may have *less* of an effect on the appellate process, especially in cases where the defendant flees and is recaptured while the appeal is pending. Because there is no delay between conviction and invocation of the appellate process, dismissal in such a case is premised on the mere *threat* to the proper operation of the appellate process. Yet the Court concedes, as it must, that courts of appeals may dismiss an appeal in this situation. *Ante,* at 239–242; see *Allen* v. *Georgia,* 166 U. S. 138 (1897).

If, as in the present case, the defendant eventually is recaptured and resentenced, he obtains a second chance to challenge his conviction and sentence, and consequently delays the appellate process by at least the amount of time he managed to elude law enforcement authorities. We are startled by the Court's assertion that "any concomitant delay . . . likely will exhaust itself well before the appellate tribunal enters the picture." *Ante,* at 245. If the defendant obtains an additional opportunity to file a timely notice of appeal, the court of appeals, in the absence of a fugitive dismissal rule or any jurisdictional defect, *must* entertain the appeal. At the very least, the result is an increase in the court's docket and a blow to docket organization and predictability. This disruption to the management of the court's docketing procedures is qualitatively different from delay caused by other factors like settlement by the parties. Unlike the fugitive's case, the settled case will not turn up as an additional and unexpected case on the court's docket some time down the road. And of course, the burden of delay increases exponentially with the number of defendants who abscond preappeal, but are recaptured and invoke the appellate court's jurisdiction in a timely manner. The Court fails to explain how this obvious delay somehow disappears when the defendant is recaptured before invoking the appellate court's jurisdiction.

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[2] The very wording of Rule 47, which gives the appellate courts authority to create local procedural rules, supports the connection requirement: "Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules *governing its practice* not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules." Fed. Rule App. Proc. 47 (emphasis added).

As is demonstrated by the instant case, the delay caused by preappeal flight can thwart the administration of justice by forcing a severance, requiring duplication of precious appellate resources, and raising the specter of inconsistent judgments. Here, the appellate process was delayed by approximately 19 months (counting both the period of fugitivity and the time used by the District Court to resentence petitioner). During this delay, the Eleventh Circuit heard and decided the appeals filed by petitioner's codefendants. *United States* v. *Mieres-Borges*, 919 F. 2d 652 (1990), cert. denied, 499 U. S. 980 (1991). Because petitioner fled, the Eleventh Circuit was unable to consolidate petitioner's appeal with those filed by his codefendants and conserve judicial resources. In addition to forcing a severance, petitioner's flight created a real possibility of inconsistent judgments. Petitioner's flight "imposed exactly the same burden of duplication on the court of appeals that it would have if he had filed his notice of appeal before absconding." Brief for United States 21. Had petitioner's counsel filed a notice of appeal on petitioner's behalf while he remained at large, the Court of Appeals could have dismissed the appeal with prejudice. See *Molinaro*, 396 U. S., at 366. Since petitioner's flight had an adverse effect on the proper functioning of the Eleventh Circuit's process, there is no principled reason why that court should not be able to dismiss petitioner's appeal.

In addition to administration, the Eleventh Circuit's fugitive dismissal rule is supported by an interest in deterring flight and encouraging voluntary surrender. Due to the adverse effects that flight, whenever it occurs, can have on the proper functioning of the appellate process, courts of appeals have an obvious interest in deterring escape and encouraging voluntary surrender. Unfortunately, today's opinion only encourages flight and discourages surrender. To a defendant deciding whether to flee before or after filing a notice of appeal, today's decision makes the choice simple. If the defendant flees preappeal and happens to get caught after the time for filing a notice of appeal has expired, he still has the opportunity for appellate review if he can persuade a district judge to resentence him. If the district judge refuses, the defendant is at no more of a disadvantage than he would have been had he escaped after filing an appeal since flight after appeal can automatically extinguish the right to appellate review. See *Molinaro*, *supra*.

A rule permitting dismissal when a defendant's flight interrupts the appellate process protects respect for the judicial system. When a defendant escapes, whether before or after lodging an appeal, he flouts the authority of the *judicial process*, of which the court of appeals is an integral part. Surely the Court does not mean to argue that a defendant who escapes during district court proceedings intends only disrespect for that tribunal. Quite obviously, a fleeing defendant has no intention of returning, at least voluntarily. His flight therefore demonstrates an equal amount of disrespect for the authority of the court of appeals as it does for the district court. Viewed in this light, the "finely calibrated response" available to the district court, *ante*, at 247, does nothing to vindicate the affront to the appellate process. The Court's argument is not enhanced by the use of farfetched hypotheticals, see *ante*, at 246, because the dignity rationale does not exist in a vacuum. As outlined above, a reviewing court may not dismiss an appeal in the absence of some effect on its orderly functioning.

While the Court recognizes that the reasoning underlying the opinion requires an exception for cases in which flight throws a wrench into the proper workings of the appellate process, *ante*, at 249–250, its rule is too narrow. The Court limits the exception to cases in which flight creates a "significant interference with the operation of [the] appellate process." *Ante*, at 250. Translated, the rule applies preappeal only when retrial is hampered, a "'meaningful appeal [is] impossible,'" or the case involves multiple defendants, thereby causing a forced severance. *Ante*, at 249–250. This grudging concession is insufficient because it fails to include those cases where sheer delay caused by the fugitivity of the lone defendant has an adverse effect on the appellate process.

In sum, courts of appeals have supervisory authority, both inherent and under Rule 47, to create and enforce procedural rules designed to promote the management of their docket. Fugitivity dismissal rules are no exception. In cases where fugitivity obstructs the orderly workings of the appellate process, this authority is properly exercised. Because petitioner's flight delayed the appellate process by approximately 19 months, and involved the burden of duplication and the risk of inconsistent judgments, we would hold that the Eleventh Circuit properly applied its fugitive dismissal rule in this case.

REITER ET AL. *v.* COOPER, TRUSTEE FOR CAROLINA MOTOR EXPRESS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 91–1496. Argued December 1, 1992—Decided March 8, 1993

The Interstate Commerce Act (ICA) requires that motor common carriers charge the tariff rates they file with the Interstate Commerce Commission (ICC), 49 U. S. C. § 10762, and that such rates be "reasonable," § 10701(a). Between 1984 and 1986, petitioner shippers tendered shipments to Carolina Motor Express, Inc., a motor carrier subject to ICC regulation, at negotiated rates that were lower than the applicable tariff rates on file with the ICC. When Carolina filed for bankruptcy, respondents, the trustee in bankruptcy and a rate auditing firm, brought adversary proceedings against petitioners in the Bankruptcy Court to recover the difference between the negotiated and tariff rates. Petitioners responded, *inter alia,* that the tariff rates were unlawful because they were unreasonably high. The Bankruptcy Court entered judgment for respondents based on the tariff rates, but the District Court reversed and referred petitioners' defenses to the ICC. The Court of Appeals reversed, holding the petitioners' "unreasonable rate" claims were no obstacle to respondents' actions because, even if the tariff rates were unreasonable, the "filed rate doctrine" required petitioners to pay those rates first and then seek relief in a separate action under § 11705(b)(3), which gives shippers an express cause of action against carriers for damages (reparations) in the amount of the difference between the tariff rate and the rate determined by the ICC to be reasonable.

Held:

1. Petitioners' unreasonable-rate claims under § 11705(b)(3) are subject to the ordinary rules governing counterclaims. Pp. 262–267.

(a) While respondents are technically correct that the unreasonable-rate issue cannot be asserted as a defense, petitioners' § 11705(b)(3) claims relate to the same shipments for which respondents seek to collect and, thus, are properly raised here as counterclaims. It makes no difference that the counterclaims may have been mistakenly designated as defenses. See Fed. Rule Civ. Proc. 8(c). Pp. 262–263.

(b) The 2-year limitation for bringing a civil action under § 11705(b)(3) is not applicable here since petitioners' claims seek merely recoupment. See *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 71. Pp. 263–265.

(c) Nothing in the ICA provides that, in a carrier's undercharge collection action, a § 11705(b)(3) counterclaim is not subject to the normally applicable provisions of the Federal Rules of Civil Procedure, including Rule 54(b). That Rule permits a district court to enter separate final judgment on any claim or counterclaim after making "an express determination that there is no just reason for delay." The "filed rate doctrine"—which embodies the principle that a shipper cannot avoid paying the tariff rate by invoking common-law claims and defenses—does not preclude avoidance of the tariff rate through claims and defenses that are specifically accorded by the ICA itself. *Crancer* v. *Lowden*, 315 U. S. 631, distinguished. Pp. 265–267.

2. Respondents' arguments that petitioners' counterclaims are not yet cognizable in court are rejected. Pp. 267–270.

(a) The contention that paying the tariff rate is a prerequisite for litigating the reasonableness issue finds no support in the ICA. Rather, the ICA provides that a claim related to shipment of property accrues on delivery or tender of delivery, § 11706(g). Pp. 267–268.

(b) Nor are petitioners required initially to present their claims to the ICC. The doctrine of primary jurisdiction requires only that a court enable "referral" to an administrative agency of a claim containing an issue within the agency's special competence, but does not deprive the court of jurisdiction. And the doctrine of exhaustion of administrative remedies—which would deprive the court of jurisdiction—is inapplicable here, both because the ICC has long interpreted the ICA as giving it no power to decree reparations itself, and because the Court can discern within the ICA no intent that ICC determination of the reasonable-rate issue must be obtained before filing the civil action. Pp. 268–270.

3. The courts below made no "express determination" required under Rule 54(b) for entry of a separate judgment on respondents' claims, and it cannot be said categorically that it would be an abuse of discretion either to grant or to deny such judgment. Although insolvency of the claimant is a factor weighing against separate judgment in that claimant's favor, this Court cannot say that insolvency is an absolute bar. *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U. S. 1, followed. Pp. 270–271.

949 F. 2d 107, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., dissented.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Robert J. Gallagher* and *Rex E. Lee.*

Michael L. Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Deputy Solicitor General Wallace, Robert S. Burk, Henri F. Rush,* and *Ellen D. Hanson.*

Joseph L. Steinfeld, Jr., argued the cause for respondents. With him on the brief were *Robert B. Walker, John T. Siegler,* and *Langdon M. Cooper.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether, when a shipper defends against a motor common carrier's suit to collect tariff rates with the claim that the tariff rates were unreasonable, the court should proceed immediately to judgment on the carrier's complaint without waiting for the Interstate Commerce Commission (ICC) to rule on the reasonableness issue.

I

In many ways, this is a sequel to our decision in *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.,* 497 U. S. 116 (1990). The facts of the two cases follow a pattern that has been replicated many times in the era of "deregulation" following enactment of the Motor Carrier Act of 1980, 94 Stat. 793: A motor carrier negotiates with a shipper rates less than the tariff rates that the Interstate Commerce Act (ICA), 49 U. S. C. § 10701 *et seq.*, requires the carrier to "publish and file" with the ICC, 49 U. S. C. § 10762. After the shipments are delivered and paid for (sometimes years after), the carrier goes bankrupt and its trustee in bankruptcy sues the shipper to recover the difference between the negotiated rates and the tariff rates. Shippers' standard defenses against such "undercharge" actions have been (1) that the carrier's attempt to collect more than the agreed-upon rates is an "unreasonable practice" proscribed by the Act, see § 10701(a), and (2) that the tariff rates were unlawful because they were unreasonably high, see *ibid.* In 1989, the ICC announced a policy approving the first of these defenses. See *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates,* 5 I. C. C. 2d 623 (1989); see also *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates,* 3 I. C. C. 2d 99 (1986); *Maislin,* 497 U. S., at 121–122. Our decision in *Maislin* held that policy invalid under the ICA, because it would "rende[r] nugatory" the specific command of § 10761 that the carrier charge the filed rate. *Id.*, at 133. While *Maislin* thus eliminated the shippers' "unreasonable practice" defense, it expressly noted that "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand." *Id.*, at 129, n. 10. The present case presents a problem of timing that has arisen out of that issue.

**Rex E. Lee, Carter G. Phillips, John K. Maser III, Frederic L. Wood, Richard D. Fortin, Daniel J. Sweeney, Paul H. Lamboley, William J. Augello, Martin W. Bercovici,* and *Robert J. Verdisco* filed a brief for the National Industrial Transportation League et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for American Freight System, Inc., by *Norman E. Beal;* for the International Brotherhood of Teamsters by *Richard N. Gilberg, Babette Ceccotti, Marc J. Fink,* and *William W. Pollock;* and for Lloyd T. Whitaker as Trustee for the Estate of Olympia Holding Corp. by *Kim D. Mann.*

Leonard L. Gumport filed a brief *pro se* as *amicus curiae.*

The shippers here are petitioners California Consolidated Enterprises (CCE) and Peter Reiter. Between 1984 and 1986, they were engaged in the business of brokering motor carrier transportation, which essentially involves serving as a middleman between motor carriers and the shipping public. During that period, petitioners tendered shipments to Carolina Motor Express, Inc., which was operating as a certified motor carrier in interstate commerce subject to regulation by the ICC. Carolina and petitioners negotiated rates for several shipments that were lower than the applicable tariff rates on file with the ICC. (Petitioners believed that Carolina would publish these negotiated rates in its tariffs, but Carolina never did so.)

In 1986, Carolina filed for bankruptcy and respondent Langdon Cooper was appointed trustee. Respondent Mark & Associates of North Carolina was retained to conduct an audit of Carolina's shipping bills, which revealed undercharges (below applicable tariff rates) in the amount of $58,793.03 on shipments made by CCE and $13,795.73 on shipments made by Reiter. Respondents brought adversary proceedings against petitioners in Bankruptcy Court to collect those amounts. Petitioners raised the standard "unreasonable practice" and "unreasonable rate" claims, and moved the Bankruptcy Court to stay proceedings and to refer those claims to the ICC. The Bankruptcy Court refused to do so and entered judgment for respondents. *In re Carolina Motor Express, Inc.*, 84 B. R. 979 (WDNC 1988). In 1989 (prior to our decision in *Maislin*), the District Court reversed and held that the "unreasonable practice" defense should be referred to the ICC. The Court of Appeals, after holding respondents' appeal in abeyance until our decision in *Maislin*, reversed the District Court. *In re Carolina Motor Express, Inc.*, 949 F. 2d 107 (CA4 1991). It held that, in light of *Maislin*, there was no need to refer the "unreasonable practice" issue to the ICC, 949 F. 2d, at 109; and that the "unreasonable rate" claim was no obstacle to the carrier's action, since even if the tariff rates were unreasonable the "filed rate" doctrine requires the shipper to pay them first and then seek relief in a separate action for damages under § 11705(b)(3), *id.*, at 110–111. We granted certiorari. 504 U. S. 907 (1992).

II

The ICA requires carriers' rates to be "reasonable," § 10701(a), and gives shippers an express cause of action against carriers for damages (called "reparations" in the precodification version of the statute, see 49 U. S. C. §§ 304a(2),

(5) (1976 ed.)) in the amount of the difference between the tariff rate and the rate determined to be reasonable by the ICC, § 11705(b)(3).[1] Respondents argue, however, that the unreasonableness of a tariff rate may not be asserted as a "defense" to an action to recover charges based on that rate. That may be true in a technical sense, since § 11705(b)(3) provides a *cause of action* rather than a *defense.* But that does not establish that the "unreasonable rate" issue cannot be raised in the present suit, since a defendant having a cause of action against a plaintiff may—indeed, often *must*—assert that cause of action as a counterclaim. See Fed. Rule Civ. Proc. 13; *Southern Constr. Co.* v. *Pickard,* 371 U. S. 57, 60 (1962). Petitioners' claims under § 11705(b)(3) are certainly properly raised here, since they relate to the same shipments for which respondents seek to collect. And it makes no difference that petitioners may have mistakenly designated their counterclaims as defenses, since Federal Rule of Civil Procedure 8(c) provides that "the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." See also 5 C. Wright & A. Miller, Federal Practice and Procedure § 1275, pp. 459–460 (2d ed. 1990) ("Inasmuch as it is not clear whether set-offs and recoupments should be viewed as defenses or counterclaims, the court, by invoking the misdesignation provision in Rule 8(c), should treat matter of this type as if it had been properly designated by defendant, and should not penalize improper labelling").

Under 49 U. S. C. § 11706(c)(2), a shipper "must begin a civil action to recover damages under [§ 11705(b)(3)] within two years after the claim accrues," which occurs "on delivery or tender of delivery by the carrier," § 11706(g). That limitation is not applicable here, however, since presented in response to the carrier's suit petitioners' claims seek merely "recoupment"—*i. e.*, the setting off against asserted liability of a counterclaim arising out of the same transaction. Recoupment claims are generally not barred by a statute of limitations so long as the main action is timely. See *Bull* v. *United States*, 295 U. S. 247, 262 (1935); 3 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 13.11 (1992). There is no reason not to apply this principle to suits under the ICA, and we have indeed already done so. In *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 71 (1956), we held that an ICA limitation provision nearly identical to the one at issue here did not prohibit the shipper (the United States) from asserting "by way of defense" unreasonable-rate claims against a carrier seeking to collect on previous shipments. Respondents seek to distinguish *Western Pacific* on the ground that the United States has a unique statutory setoff right (now codified at 31 U. S. C. § 3726), allowing it to deduct from amounts due to a carrier prior overcharges by the carrier. That statute may well have been essential to the holding in the case, since some of the amounts withheld by the United States were not recoupments (they related to shipments other than those that were the subjects of the carriers' suits). But the rationale of the case is the same as the rationale that permits recoupment here: "Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit." 352 U. S., at 71. See *Glama Dress Co.* v. *Mid-South Transports, Inc.*, 335 I. C. C. 586, 589 (1969). Courts of Appeals have understood *Western Pacific* as expressing not just a narrow holding based on the United States setoff statute, but a general principle of recoupment applicable in other contexts. See *Distribution Services, Ltd.* v. *Eddie Parker Interests, Inc.*, 897 F. 2d 811, 813 (CA5 1990); *In re Smith*, 737 F. 2d 1549, 1554 (CA11 1984); *118 East 60th Owners, Inc.*

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[1] Section 11705(b)(3) provides in relevant part:

"A common carrier providing transportation or service subject to the jurisdiction of the Commission . . . is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle."

v. *Bonner Properties, Inc.*, 677 F. 2d 200, 203 (CA2 1982); *Luckenbach S. S. Co.* v. *United States*, 312 F. 2d 545, 549, n. 3 (CA2 1963).

One major consequence does attach to the fact that an unreasonable-rate claim is technically a counterclaim rather than a defense: A defense cannot possibly be adjudicated separately from the plaintiff's claim to which it applies; a counterclaim can be. Federal Rule of Civil Procedure 54(b) permits a district court to enter separate final judgment on any claim or counterclaim, after making "an express determination that there is no just reason for delay." See *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427 (1956); *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445 (1956). This power is largely discretionary, see *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U. S. 1, 10 (1980), to be exercised in light of "judicial administrative interests as well as the equities involved," *id.*, at 8, and giving due weight to "'the historic federal policy against piecemeal appeals,'" *ibid.* (quoting *Sears, supra*, at 438).[2]

Nothing in the ICA provides that, in an action by a carrier to collect undercharges, a § 11705(b)(3) counterclaim is not subject to the normally applicable provisions of the Federal Rules. Respondents contend that the so-called "filed rate doctrine" gives them absolute entitlement to judgment on their undercharge claims, without defense or counterclaim.

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[2] For purposes of applying the Federal Rules of Civil Procedure governing counterclaims, it does not matter that this action arose in bankruptcy. Rules 8 and 54 are made fully applicable in adversary proceedings by Bankruptcy Rules 7008 and 7054, and Rule 13 is made applicable with only minor variation (not relevant here) by Bankruptcy Rule 7013. It is well settled, moreover, that a bankruptcy defendant can meet a plaintiff-debtor's claim with a counterclaim arising out of the same transaction, at least to the extent that the defendant merely seeks recoupment. See *In re B & L Oil Co.*, 782 F. 2d 155, 157 (CA10 1986); *Lee* v. *Schweiker*, 739 F. 2d 870, 875 (CA3 1984). Recoupment permits a determination of the "just and proper liability on the main issue," and involves "no element of preference." 4 Collier on Bankruptcy ¶ 553.03, p. 553–17 (15th ed. 1991).

We disagree. The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. See *Texas & Pacific R. Co.* v. *Mugg,* 202 U. S. 242, 245 (1906); *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94, 98 (1915); *Pittsburgh, C., C. & S. L. R. Co.* v. *Fink,* 250 U. S. 577, 581–582 (1919). It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the ICA itself. We can agree with respondents that this latter category does not include any "unreasonable rate defense," derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be "reasonable." See *T. I. M. E. Inc.* v. *United States,* 359 U. S. 464, 468–472 (1959). But we cannot agree that the filed rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

Contrary to respondents' contention, the preclusive effect of the filed rate doctrine over reparations counterclaims is not established by our opinion in *Crancer* v. *Lowden,* 315 U. S. 631 (1942). There, shippers sued by a rail carrier for payment of tariff rates challenged them as unreasonable, and sought to stay the collection action until the ICC had an opportunity to rule on that issue. The District Court denied the stay and entered judgment for the carrier. But unlike the present petitioners, the shippers in *Crancer had* no counterclaim; they had already instituted an administrative reparations proceeding (as the ICA allowed for rail carriage) before they were sued in district court, see Reply Brief for Petitioners 13 and Brief for Respondents 18, in *Crancer* v. *Lowden,* O. T. 1941, No. 505, which precluded filing a reparations claim in district court. See 49 U. S. C. § 9 (1946 ed.). Moreover, all that *Crancer* held was that "there was no abuse of discretion by the trial judge," since the equities balanced against waiting for the ICC's determination. 315

U. S., at 636. Thus, *Crancer* held that the court was not *required* to stay the collection proceeding until the ICC ruled on the reasonableness of rates; not that the court was *prohibited* from doing so. That is entirely consistent with our holding here.

III

Respondents raise two arguments to the effect that petitioners' § 11705(b)(3) counterclaims are not yet cognizable in court. First, respondents argue that there exists what they denominate as a "pay first" rule, whereby payment of the tariff rate is a "prerequisite to litigating the rate reasonableness issue." Brief for Respondents 23. See also *Milne Truck Lines, Inc.* v. *Makita U. S. A., Inc.*, 970 F. 2d 564, 572 (CA9 1992) (embracing similar theory). That argument would have merit if the holding in *United States ex rel. Louisville Cement Co.* v. *ICC*, 246 U. S. 638 (1918), were still good law. In that case, this Court held that a shipper's cause of action for reparations did not accrue "until payment had been made of the unreasonable charges." *Id.*, at 644. The opinion noted that "if Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, . . . a simple and obvious form for expressing that intention would have been used." *Ibid.* Within two years, Congress enacted a simple and obvious provision stating that any "cause of action in respect of a shipment of property shall . . . be deemed to accrue upon delivery or tender of delivery." Transportation Act of 1920, § 424, 41 Stat. 492. That provision survives in substantially the same form in text now codified at 49 U. S. C. § 11706(g). While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute. We therefore hold that petitioners could assert a claim under § 11705(b)(3) before payment, but after their shipments were delivered.

Second, respondents contend that the doctrine of primary jurisdiction requires petitioners initially to present their unreasonable-rate claims to the ICC, rather than to a court. That reflects a mistaken understanding of primary jurisdiction, which is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a "referral" to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling.[3] See *Western Pacific,* 352 U. S., at 63–64; *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289, 291, 302 (1973); *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic,* 400 U. S. 62, 65, 68 (1970). Referral of the issue to the administrative agency does not deprive the court of jurisdiction; it has discretion either to retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case

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[3] "Referral" is sometimes loosely described as a process whereby a court refers an issue to an agency. See, *e. g.,* 28 U. S. C. § 1336. But the ICA (like most statutes) contains no mechanism whereby a court can on its own authority demand or request a determination from the agency; that is left to the adversary system, the court merely staying its proceedings while the shipper files an administrative complaint under § 11701(b). See § 11705(c)(1) (second sentence). Use of the term "referral" to describe this process seems to have originated in *Western Pacific,* which asserted that, where issues within the special competence of an agency arise, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pacific R. Co.,* 352 U. S. 59, 64 (1956). At the conclusion of that passage, the *Western Pacific* Court cited *General American Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, 433 (1940), which in turn cited *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247 (1913). *Mitchell Coal* spelled out the actual procedure contemplated, holding that further action by the district court should "be stayed so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice," *id.,* at 267.

without prejudice. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U. S. 213, 222–223 (1966); *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.,* 230 U. S. 247, 266–267 (1913); Jaffe, Primary Jurisdiction, 77 Harv. L. Rev. 1037, 1055 (1964).

The result that respondents seek would be produced, not by the doctrine of primary jurisdiction, but by the doctrine of exhaustion of administrative remedies. Where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed. See *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50–51 (1938); *Heckler* v. *Ringer,* 466 U. S. 602, 617, 619, and n. 12 (1984). That doctrine is inapplicable to petitioners' reparations claims, however, because the ICC has long interpreted its statute as giving it no power to decree reparations relief. Shortly after enactment of the provision now codified at § 11705(b)(3), the ICC said that the law did not "grant the Commission any initial jurisdiction . . . with respect to the award of reparations"; rather, "shippers' recourse *must* be to the courts," which would "refer" the issue of rate reasonableness to the Commission. *Informal Procedure for Determining Motor Carrier and Freight Forwarder Reparation,* 335 I. C. C. 403, 413 (1969). The ICC continues to adhere to that view. Brief for United States as *Amicus Curiae* 9, n. 6; *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates,* 3 I. C. C. 2d, at 106–107; *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates,* 5 I. C. C. 2d, at 625, 630–631. We find that to be at least a reasonable interpretation of the statute, and hence a binding one. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984).

Nor can we discern within the ICA an intent that, even though the ICC cannot decree relief, ICC determination of the reasonable-rate issue must be obtained before filing the civil action. Since the limitations period for filing actions under § 11705(b)(3) begins running at the time of delivery of the shipment, rather than at the time the ICC enters an order, compare §§ 11706(c)(2) and (g) with § 11706(e), the period could expire before the ICC acted. We are not disposed to find an implicit prior-agency-determination requirement that would have such consequences.

IV

Since we have concluded that petitioners' unreasonable-rate claims are subject to the ordinary rules governing counterclaims, the judgment below must be reversed. Neither the Court of Appeals nor the District Court made the "express determination" required under Rule 54(b) for entry of a separate judgment on respondents' claims, and we cannot say categorically that it would be an abuse of discretion either to grant or to deny separate judgment. In the ordinary case, where a carrier is solvent and has promptly initiated suit, the equities favor separate judgment on the principal claim: referral of the unreasonable-rate issue could produce substantial delay, and tariff rates not disapproved by the ICC are legal rates, binding on both the shipper and the carrier. See *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922); *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 384 (1932); *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516, 520 (1939). The equities change, however, when the suing carrier is in bankruptcy. Indeed, we have previously held that even a "threat of insolvency" of the party seeking separate judgment is a factor weighing against it. See *Curtiss-Wright*, 446 U. S., at 12. Even so, we cannot say that insolvency is an absolute bar. Conceivably, a district court could determine that other equities favor separate judgment—for example, a threat that the *shipper* may become insolvent, which Rule 62(h) would allow a court to protect against by entering separate judgment for the carrier but staying enforcement on condition that the shipper deposit the amount of the judgment with the court. *Id.*, at 13, n. 3.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN dissents.

DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* LASHLEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92–409. Decided March 8, 1993

During the penalty phase of respondent Lashley's capital murder trial, his counsel requested that the jury be instructed on the mitigating circumstance that Lashley had no significant criminal history. However, when neither Lashley's counsel nor the prosecutor presented proof of the mitigating circumstance, the trial judge refused to give the requested instruction and Lashley was sentenced to death. Subsequently a Federal District Court dismissed Lashley's habeas petition, rejecting his claim that the state judge's failure to give the instruction violated due process. The Court of Appeals granted relief, holding that this Court's decision in *Lockett* v. *Ohio*, 438 U. S. 586, required the State, which was in a peculiarly advantageous position to show a significant prior criminal history, to come forward with evidence or else the court must instruct the jury on the mitigating circumstance.

Held: State courts are not obligated by the Constitution to give mitigating circumstance instructions when no evidence is offered to support them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction. States are not better positioned than defendants to adduce evidence of a defendant's own criminal history. Assuming, *arguendo*, that a presumption of innocence of other crimes did attach at Lashley's sentencing, he still was not constitutionally entitled to a "presumption of innocence" instruction.

Certiorari granted; 957 F. 2d 1495, reversed.

PER CURIAM.*

I

Respondent Frederick Lashley brutally beat and stabbed to death his 55-year-old, physically impaired cousin and foster mother, Janie Tracy, in the course of robbing her. An adult in the eyes of Missouri law at age 17, Lashley was convicted of capital murder, Mo. Rev. Stat. § 565.001 (1978) (repealed Oct. 1, 1984), and sentenced to death. At a conference preceding the penalty phase of the trial, one of Lashley's attorneys asked the judge to instruct the jury on the mitigating circumstance that "[t]he defendant ha[d] no significant history of prior criminal activity," Mo. Rev. Stat. § 565.012.3(1) (1978) (current version Mo. Rev. Stat. § 565.032.3(1) (Supp. 1991)). App. to Pet. for Cert. A–86 to A–87. Defense counsel sought this instruction even though she repeatedly asserted that she would not try to show that Lashley lacked a criminal past. *Id.*, at A–84, A–86. At the same time, she moved for an order prohibiting the State from cross-examining defense witnesses as to Lashley's juvenile record. *Id.*, at A–83, A–84. Such questioning may not have been permissible under Missouri law. See Mo. Rev. Stat. § 211.271 (1986). In any event, the judge did not expressly rule on the latter motion. See *Lashley* v. *Armontrout*, 957 F. 2d 1495, 1501, n. 1 (1992) ("[T]he trial court was not called upon to rule in respect to the admissibility of defendant's juvenile record"). The judge did indicate, however, that Lashley would not be entitled to the requested instruction without supporting evidence. App. to Pet. for Cert. A–84, A–87.

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*JUSTICE SOUTER joins only Part I of this opinion.

Perhaps Lashley's attorneys chose not to make the necessary proffer because they feared that the prosecutor would be permitted to respond with evidence that Lashley had engaged in criminal activity as a juvenile. One of the attorneys so testified in a state collateral proceeding. Tr. 29 (Apr. 10, 1985). Or perhaps defense counsel sought to avoid opening the door to evidence that Lashley had committed other crimes as an adult. As the Missouri Supreme Court observed, the record indicates that, following his arrest, Lashley confessed to committing several other crimes after attaining adult status.* *State* v. *Lashley,* 667 S. W. 2d 712, 716 (Mo.), cert. denied, 469 U. S. 873 (1984); see also 667 S. W. 2d, at 717 (Blackmar, J., concurring in part and dissenting in part).

Whatever their reasons, Lashley's lawyers presented no proof that he lacked a significant criminal history. Nor did the prosecutor submit any evidence that would support the mitigating circumstance. The trial judge refused to give the jury the "no significant history of prior criminal activity" instruction. The Missouri Supreme Court affirmed. It reasoned that Missouri law requires mitigating circumstance instructions to be supported by some evidence, see, *e. g., State* v. *Battle,* 661 S. W. 2d 487, 492 (Mo. 1983), cert. denied, 466 U. S. 993 (1984); see also *State* v. *Williams,* 652 S. W. 2d 102, 114 (Mo. 1983), and none was offered here. *State* v. *Lashley, supra,* at 715–716.

Lashley filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. He alleged that the trial judge's failure to give the requested instruction violated due process. The District Court dismissed the claim. *Lashley* v. *Armontrout,* No. 87–897C(2) (ED Mo., June 9, 1988). A divided panel of the Court of Appeals for the Eighth Circuit, however, granted

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*At the guilt phase of the trial, defense counsel moved to exclude "some confessions regarding 7 other crimes," including burglary, robbery, and stealing. Tr. 425 (Jan. 27, 1982). The motion was made not on the ground that the crimes were connected to the charged offense, cf. *post,* at 280, n. 1, or that they were committed while Lashley was a juvenile, but because they were "extremely prejudicial" and "[ir]relevant" to Lashley's guilt or innocence of the murder. Motion *in Limine,* Record 143 (Jan. 21, 1982). In a pretrial conference, defense counsel specifically stated that at least one of the crimes had been committed "a week or two" before the murder—that is, when Lashley was already an adult. Tr. 425 (Jan. 27, 1982). The presentence report contains additional evidence. Under the heading "Adult Arrest Record," the report indicates that Lashley was arrested for three offenses (robbery, burglary, and stealing) the day after his arrest for the present crime. Missouri Dept. of Social Services, Div. of Probation and Parole 2 (Mar. 23, 1982).

relief. *Lashley* v. *Armontrout*, 957 F. 2d 1495 (1992). The Court of Appeals thought that the trial judge's ruling violated the Eighth Amendment under *Lockett* v. *Ohio*, 438 U. S. 586 (1978). In the majority's view, "*Lockett* requires the State—which is in a peculiarly advantageous position to show a significant prior criminal history, if indeed Lashley has such a history—to come forward with evidence, or else the court must tell the jury it may consider the requested mitigating circumstance." 957 F. 2d, at 1502. The court held that "the lack of any evidence whatever of Lashley's prior criminal activity entitled [him] to the requested instruction." *Ibid.*

As Judge Fagg explained in dissent, see *id.*, at 1502–1504, the majority plainly misread our precedents. We have held that the sentencer must be allowed to consider in mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death." *Lockett, supra,* at 604 (plurality opinion) (emphasis added). Accord, *Penry* v. *Lynaugh*, 492 U. S. 302, 317 (1989); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982); see also *Penry, supra,* at 327 ("[S]o long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence *introduced by a defendant*" (emphasis added)). But we never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence.

On the contrary, we have said that to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants. See *Hopper* v. *Evans*, 456 U. S. 605, 611 (1982). And, answering a question expressly reserved in *Lockett*, we recently made clear that a State may require the defendant "'to bear the risk of nonpersuasion as to the existence of mitigating circumstances.'"

Walton v. *Arizona,* 497 U. S. 639, 650 (1990) (plurality opinion) (quoting *Lockett, supra,* at 609, n. 16); see also 497 U. S., at 669–673 (SCALIA, J., concurring in part and concurring in judgment) (rejecting *Lockett*). In *Walton* we rejected a challenge to a state statute that imposed on capital defendants the burden of establishing the existence of mitigating circumstances by a preponderance of the evidence—a higher evidentiary standard, we note, than Missouri has adopted. Discerning no "constitutional imperative . . . that would require the [sentencer] to consider the mitigating circumstances claimed by a defendant unless the State negated them," 497 U. S., at 650, we concluded that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden . . . to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency," *ibid.*

Even prior to *Walton,* other lower courts rejected arguments similar to Lashley's. For example, in *State* v. *Fullwood,* 323 N. C. 371, 373 S. E. 2d 518 (1988), vacated and remanded on other grounds, 494 U. S. 1022 (1990), the court held that the trial judge did not err by refusing to submit to the jury a "no significant history of prior criminal activity" instruction where neither the defendant nor the State introduced evidence to support it. 323 N. C., at 394, 373 S. E. 2d, at 532; see also *Hutchins* v. *Garrison,* 724 F. 2d 1425, 1436–1437 (CA4 1983) (where defendant did not request a criminal history mitigating instruction and the record did not support it, any error resulting from failure to give the instruction was an error of state law only), cert. denied, 464 U. S. 1065 (1984). In *DeLuna* v. *Lynaugh,* 890 F. 2d 720 (1989), the Fifth Circuit held that a capital defendant was not entitled to a mitigating instruction under *Penry* because he had made a "tactical decision" not to introduce supporting evidence that would have "opened the door to the introduction in evidence of a prior criminal record." 890 F. 2d, at 722. Accord, *May* v. *Collins*, 904 F. 2d 228, 232 (CA5 1990), cert. denied, 498 U. S. 1055 (1991).

In short, until the Court of Appeals' decision in this case, it appears that lower courts consistently applied the principles established by *Lockett* and its progeny. Today we make explicit the clear implication of our precedents: Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them. Because the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction.

We are not persuaded by the Court of Appeals' assertion that the State was uniquely situated to prove whether or not Lashley had a significant prior criminal history. As an initial matter, Missouri law does not demand *proof* that a mitigating circumstance exists; it requires only some supporting evidence. Lashley acknowledged in his federal habeas petition that his attorneys could have put forward some evidence that he lacked a significant prior criminal history; indeed, he contended that they were constitutionally ineffective for failing to do so. App. to Pet. for Cert. A–71. There is no reason to suppose, as the dissent suggests, *post*, at 288, that Lashley would be required to testify in order to receive the mitigating instruction. Before the state trial court, the prosecution submitted that testimony by Lashley's acquaintances would suffice. App. to Pet. for Cert. A–83. On these facts, we cannot say that the State unfairly required Lashley to prove a negative.

Nor are we convinced that, as a general rule, States are better positioned than criminal defendants to adduce evidence of the defendants' own criminal history. While the prosecution may have ready access to records of crimes committed within its own jurisdiction, the same may not be true when the defendant has committed crimes in other jurisdictions, perhaps over a period of many years. And any presentence report that is created is available to both the government and the defense. In this case, Lashley has not suggested that he was unable to offer his presentence report as evidence that his prior criminal record was insignificant. Moreover, the statutory mitigating circumstance refers not to arrests or convictions, but more broadly to "criminal activity." To the extent that this includes criminal conduct that has not resulted in formal charges, no one is better able than the defendant to make the required proffer.

II

The dissent contends that this case is not about the requirements of *Lockett* at all, but about the "presumption of innocence." *Post,* at 281. The question the dissent raises is indeed "novel," *ibid.;* it apparently was not raised in either the District Court or the Court of Appeals, and it was not presented to this Court. Nor does the dissent's argument compel a different result. To be sure, we have said that "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle* v. *Williams,* 425 U. S. 501, 503 (1976). The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt. *Taylor* v. *Kentucky,* 436 U. S. 478, 484, n. 12 (1978). But even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense. *Kentucky* v. *Whorton,* 441 U. S. 786, 789 (1979) *(per curiam).* An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a " 'genuine danger' " that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt. *Ibid.* (quoting *Taylor, supra,* at 488).

Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears.

See *Herrera* v. *Collins,* 506 U. S. 390, 399 (1993); *id.,* at 443 (BLACKMUN, J., dissenting). We have not considered previously whether a presumption that the defendant is innocent of other crimes attaches at the sentencing phase. But even assuming that such a presumption does attach, Lashley was not entitled to a "presumption of innocence" instruction. Under our precedents, the instruction would have been constitutionally required only if the circumstances created a genuine risk that the jury would conclude, from factors other than the State's evidence, that the defendant had committed other crimes. See, *e. g., Whorton, supra,* at 788–789. Lashley does not contend that any such circumstances existed in this case. As the dissent acknowledges, *post,* at 281, the record before the jury was completely silent on the question whether Lashley had committed prior offenses. The jury was specifically instructed that the State had the burden of proving the existence of any aggravating circumstances "beyond a reasonable doubt." Instructions Nos. 20–21, Record 77, 79 (Jan. 29, 1982). Nothing disturbed the presumption that Lashley was a first offender.

The "circumstances" on which the dissent relies, *post,* at 284–285, had no bearing on the jurors' perceptions. Lashley's age and the sentence to which he was subject were irrelevant to the question whether the jury might conclude improperly that he was a repeat offender. The dissent assigns special weight to the fact that defense counsel may have decided not to introduce evidence concerning Lashley's prior criminal history for fear that the State would introduce Lashley's juvenile record. We note that, had the trial court improperly admitted evidence of Lashley's juvenile record, defense counsel could have objected and preserved the issue for appeal. In any event, the only impact that defense counsel's decision not to make the necessary proffer could have had on the *jury* was to deprive it of possible testimony that Lashley lacked a criminal history. Without such testimony, the record before the jury was still silent on the question of Lashley's criminal past. Thus, assuming, *arguendo*, that a presumption of innocence did attach at Lashley's sentencing, under *Whorton* he was not constitutionally entitled to a "presumption of innocence" instruction.

Lashley's motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Thirty days after his 17th birthday, respondent entered his cousin's home, murdered her, and stole about $15. He was promptly arrested and made a series of confessions to the police. A portion of one of those confessions apparently referred to other crimes, but that portion was not admitted into evidence and is not in the record. Although it seems probable that several of those "other" crimes were committed in connection with the murder, a comment by respondent's counsel in a pretrial conference indicates that one of them involved the same victim's house "a week or two beforehand."[1] The record tells us nothing about the manner in which that specific statement was elicited, the seriousness of the incident, the dates when that or any of the other incidents occurred, or even whether counsel's description of the statement was accurate. Yet that one vague reference may now explain the Court's willingness to reinstate respondent's death sentence without hearing argument on the merits of the novel and important constitutional question that the case presents. That question is whether the presumption of innocence (uncontradicted in any way by the prosecution) supports an instruction to the jury at sentencing that the capital defendant's lack of a significant criminal history is a factor mitigating against its imposition of the death penalty. The Court acknowledges that the defendant's testimonial assertion of innocence *would* support the instruction, see *ante*, at 277; it fails to recognize that the presumption of innocence does so as well.

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[1] In support of a motion *in limine* respondent's counsel asked the court to exclude his client's confession of crimes unrelated to the offense on trial. He argued that the State had "extracted some confessions regarding 7 other crimes, a burglary second, a robbery first, stealing under, and I think it was a few more for a total of 7. One of the ones Lashley confessed to did involve the same victim's house. It was a week or two beforehand. My motion in limine is asking the Court to sustain my motion of course forbidding Mr. Bauer [the prosecutor] to bring these up." Tr. 425 (Jan. 27, 1982).

The question arises because the record on which the jury relied in imposing the death sentence contains no evidence of any criminal activity by respondent except the serious felony for which he has been convicted and sentenced. Speculation by appellate judges, see *ante*, at 273–274, about a matter that was neither available to the sentencing authority nor mentioned by the State in its petition in this Court is not a substitute for admissible evidence presented in an adversary proceeding.[2] Speculation about his juvenile record is impermissible; state law prohibits any use of such evidence in adult criminal proceedings.[3] Accordingly, as the case comes to us, the record is silent on the question whether respondent led an entirely blameless life prior to this offense.

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[2] Although the majority is willing to rely on these unfounded remarks, see *ante*, at 273–274, the State itself did not present any such evidence at respondent's trial or sentencing, and it has not suggested to us (or to any lower court) that respondent actually committed a single criminal act between his 17th birthday and the murder of his cousin.

As the Court notes, *ante*, at 274, n., respondent argued both that this statement was "[ir]relevant," and that "to admit the statements or written confessions into evidence would be extremely prejudicial . . . ." Motion *in Limine*, Record 143 (Jan. 21, 1982). Respondent was correct, of course, about the improper prejudice that would have resulted from admitting statements about alleged crimes with which he was never charged and on which the State has never relied in arguing that the instruction in question was properly withheld. It is unfortunate that respondent was spared such prejudice in the trial court only to have it reapplied (under the Court's reading of a stray comment in the record) here.

Missouri's capital sentencing statute provides that the absence of any significant history of prior criminal activity is a circumstance militating against the imposition of the death penalty.[4] In Missouri, therefore—as in the many States with the same statutory mitigating factor—the jury should be so instructed when the record contains no evidence of any prior record of criminal activity.

The legal basis for the Court's summary disposition of this case is the general rule that a trial judge's instructions to the jury must normally relate to evidence in the record. That general rule, however, has no application to an instruction on the presumption of innocence in an ordinary criminal trial. In my opinion, the general rule is equally inapplicable in the capital sentencing process when the defendant requests an instruction explaining the statutory mitigating circumstance at issue in this case.

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[3] The relevant Missouri statute provides:

"1. No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.

. . . . .

"3. After a child is taken into custody as provided in section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court *are not lawful or proper evidence* against the child and *shall not be used for any purpose whatsoever in any proceeding, civil or criminal,* other than proceedings under this chapter." Mo. Rev. Stat. § 211.271 (1978) (emphasis added).

[4] Missouri Rev. Stat. § 565.012.3(1) (1978) (current version Mo. Rev. Stat. § 565.032.3(1) (Supp. 1991)) establishes the following as a statutory mitigating factor:

"The defendant ha[d] no significant history of prior criminal activity."

Even if the statute did not so provide, our holding in *Lockett* v. *Ohio,* 438 U. S. 586 (1978), would require that consideration be given to that mitigating factor.

I

It has been settled for almost a century that the presumption of innocence, when uncontradicted, is an adequate substitute for affirmative evidence. In 1895 the Court held that refusing to give an instruction on the presumption of innocence was reversible error, explaining that "this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin* v. *United States*, 156 U. S. 432, 459. A few years later, in his landmark treatise on evidence, Professor Thayer, while noting that a presumption is not itself evidence, concluded:

> "What appears to be true may be stated thus:—
>
> "1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence.
>
> "2. It serves therefore the purposes of a *prima facie* case, and in that sense it is, temporarily, the substitute or equivalent for evidence." J. Thayer, A Preliminary Treatise on Evidence at the Common Law, Appendix B, p. 575 (1898) (hereinafter Thayer).[5]

The presumption of innocence plays a unique role in criminal proceedings. As Chief Justice Burger explained in his opinion for the Court in *Estelle* v. *Williams*, 425 U. S. 501 (1976):

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[5] "A presumption may be called 'an instrument of proof,' in the sense that it determines from whom evidence shall come, and it may be called something 'in the nature of evidence,' for the same reason; or it may be called a substitute for evidence, and even 'evidence'—in the sense that it counts at the outset, for evidence enough to make a *prima facie* case." Thayer 576.

> "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:
>
> "'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' *Coffin* v. *United States,* 156 U. S. 432, 453 (1895)." *Id.,* at 503.

The failure to instruct the jury on the presumption may violate the Due Process Clause of the Fourteenth Amendment even when a proper instruction on the prosecution's burden of proving guilt beyond a reasonable doubt has been given. *Taylor* v. *Kentucky,* 436 U. S. 478 (1978). Whether the omission amounts to a constitutional violation in a noncapital case depends on "the totality of the circumstances," *Kentucky* v. *Whorton,* 441 U. S. 786, 789 (1979). In my judgment, the instruction should always be given in a capital case.

That conclusion is not essential to my appraisal of the capital case before us today, however, because the totality of circumstances here included respondent's age, the sentence to which he was subject, and—of special importance—the trial judge's erroneous refusal to prohibit cross-examination about his juvenile record. As Chief Judge Arnold explained:

> "[T]rial counsel made a reasonable effort to introduce [affirmative evidence showing that petitioner had no significant criminal history] but was prevented from doing so by an incorrect ruling of the state trial court. The court told counsel that if she insisted on offering evidence that Lashley had no criminal record, it would permit the state to counter this evidence by showing that petitioner had committed juvenile offenses. This ruling

> was flatly contrary to state law." *Lashley* v. *Armontrout*, 957 F. 2d 1495, 1500, n. 1 (CA8 1992).[6]

This erroneous ruling by the trial judge unquestionably explains why the record contains no specific testimony about respondent's prior criminal history. Even though due process may not *automatically* entitle a defendant to an instruction that he is presumed innocent of other offenses at the penalty phase of the trial, under *Whorton, supra*, the instruction should certainly be given when a trial court error is responsible for the absence of evidence supporting the instruction.

The failure to instruct the jury on the presumption of innocence at the guilt phase of respondent's trial—whether or not respondent had presented any evidence of his innocence—would have been constitutional error requiring reversal of his conviction. Under our holding in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), the comparable refusal in this case was also constitutional error requiring the vacation of respondent's death sentence.[7] The Court of Appeals, therefore, properly set aside a sentence of death imposed by a jury uninformed that the state legislature had expressly authorized it to withhold that sentence because the defendant had no prior criminal record.[8]

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[6] The other two members of the panel did not agree with Chief Judge Arnold's opinion that this error constituted "a separate and distinct violation of the principle of *Lockett* v. *Ohio*, 438 U. S. 586 . . . (1978)," 957 F. 2d, at 1500–1501, n. 1, but they did not question his interpretation of state law.

[7] We have made it clear that procedural safeguards constitutionally required at the guilt stage of a capital trial are also required at the penalty stage. *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion) ("[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause"); *Estelle* v. *Smith*, 451 U. S. 454 (1981) (Fifth Amendment privilege against self-incrimination applies at capital sentencing); *Bullington* v. *Missouri*, 451 U. S. 430 (1981) (Double Jeopardy Clause applies at capital sentencing). In *Bullington* we actually considered the same Missouri statutes that regulated *this* respondent's capital sentencing, and held that "[b]y enacting a capital sentencing procedure that resembles a trial on the issue of guilt or innocence, however, Missouri *explicitly requires* the jury to determine whether the prosecution has 'proved its case.'" *Id.*, at 444 (emphasis in original).

II

The mitigating factor in question corresponds precisely to the presumption of innocence. When the trial record reveals no prior criminal history at all the presumption serves as "a *prima facie* case, and in that sense it is, temporarily, the substitute or equivalent for evidence," Thayer 575, that a criminal defendant is blameless in spite of his indictment, and that even after conviction of one crime, he is presumptively innocent of all other crimes. The State cannot refute the presumption of innocence at the guilt phase of the trial without presenting any evidence that the defendant committed the act for which he was indicted; similarly, it has no basis for objecting to a mitigating instruction on the absence of a prior criminal history if it has done nothing to rebut the *prima facie* case established by the presumption of innocence at the sentencing phase of the trial.[9]

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[8] It is true that respondent's claim of constitutional error focused on the trial court's refusal to prohibit cross-examination about his juvenile record and did not mention the presumption of innocence. Similarly, the Court of Appeals relied on the rationale of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), without mentioning the presumption. Nevertheless, our jurisprudence firmly establishes that it is appropriate to *affirm* a judgment on a ground that was not raised below. It is manifestly unjust to *reverse* a correct judgment and to reinstate the death penalty simply because the basis for the judgment was not adequately articulated in earlier proceedings.

[9] As the Court correctly notes, just as we have held generally that refusing to give an instruction on the presumption of innocence is not always reversible error, we have also held as a general matter that a capital defendant may be required to present evidence supporting a requested instruction on a statutory mitigating factor. *Ante*, at 275–276. We have even held that the State may require a capital defendant to support a requested jury instruction with a preponderance of the evidence. *Walton* v. *Arizona*, 497 U. S. 639 (1990). But we have never held that a defendant with a presumptively clean record must present additional evidence in sup-

In this case, as the Court expressly acknowledges, nothing in the record "disturbed the presumption that Lashley was a first offender." *Ante,* at 279. There was no danger that the "jury might conclude improperly that he was a repeat offender." *Ibid.* What was lacking, however, was advice to the jury that Missouri law draws a distinction between first offenders and repeat offenders and provides that membership in one class rather than the other shall be considered a mitigating fact no matter how serious the offense committed by the defendant may be. Failure to advise the jury about the mitigating effect of his status as first offender is just as unfair as the failure to advise the jury that it should consider evidence offered by a defendant "as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." *Penry* v. *Lynaugh,* 492 U. S. 302, 320 (1989) (emphasis in original).[10]

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port of that record to receive an instruction about it. Whether the presumption that a defendant—even a convicted capital defendant—is innocent of all other crimes is viewed as evidence in his favor or merely as a rule of evidence imposing a burden of proof on the State, it means that the State must offer *something* to disprove it. Because the State in this case offered *nothing* to disprove it, the instruction was constitutionally required.

[10] "We note that the Oklahoma death penalty statute permits the defendant to present evidence 'as to any mitigating circumstances.' Okla. Stat., Tit. 21, § 701.10 (1980). *Lockett* requires the sentencer to listen." *Eddings* v. *Oklahoma,* 455 U. S. 104, 115, n. 10 (1982). "I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. Even though the petitioner had an opportunity to present evidence in mitigation of the crime, it appears that the trial judge believed that he could not consider some of the mitigating evidence in imposing sentence. In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is 'purely a matter of semantics,' as suggested by the dissent. *Woodson* [v. *North Carolina,* 428 U. S. 280 (1976)] and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." *Id.,* at 119 (O'CONNOR, J., concurring).

Because "no one is better able than the defendant to make the required proffer," *ante*, at 278, the Court considers it fair to require him to attest to his own innocence of any criminal history before the jury may be allowed to rely on the mitigating circumstance when it considers putting him to death. This suggestion is inconsistent with our refusal to allow the capital sentencing process to burden the defendant's Fifth Amendment privilege against self-incrimination.[11] It obviously would have been constitutional error for the prosecutor or the judge to comment on the defendant's failure to testify at the guilt or sentencing phase of the trial; it is equally wrong to deny him an otherwise appropriate mitigating instruction because he failed to testify.

Admittedly, my analysis of the case enables the respondent to obtain a double benefit from his youth. That he was barely 17 years old when he committed the offense is itself a mitigating circumstance; it also serves to shield any earlier misbehavior from scrutiny when his life is at stake. I believe, however, that such a double benefit is entirely appropriate when a State seeks to take the life of a young person. To deny that benefit undermines important protections that the law has traditionally provided to youthful offenders because of their lesser moral culpability and greater potential for rehabilitation. It is doubly disturbing that the Court acts summarily in this case, thus expediting the execution of a defendant who, I firmly believe, should not be eligible for the death penalty at all. See *Thompson* v. *Oklahoma*, 487 U. S. 815, 830–831 (1988) (plurality opinion).

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[11] The Fifth Amendment privilege against self-incrimination, applied against the States through the Fourteenth Amendment in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), clearly applies at the sentencing phase of a capital trial. *Estelle* v. *Smith*, 451 U. S., at 463 ("Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees. See *Green* v. *Georgia*, 442 U. S. 95, 97 (1979); *Presnell* v. *Georgia*, 439 U. S. 14, 16 (1978); *Gardner* v. *Florida*, 430 U. S. 349, 357–358 (1977) (plurality opinion)").

I respectfully dissent.

DEMOS *v.* STORRIE ET AL.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 92–6846. Decided March 8, 1993

Since this Court denied petitioner Demos leave to proceed *in forma pauperis* in all future petitions for extraordinary relief, he has filed 14 petitions for certiorari.

Held: Demos is denied leave to proceed under this Court's Rule 39.8, and the Clerk is directed to reject all future petitions for certiorari from Demos in noncriminal matters unless he pays the required docketing fee and submits his petition in compliance with Rule 33. His continued course of abusive filings plainly warrants this sanction.

Motion denied.

PER CURIAM.

Pro se petitioner John R. Demos, Jr., has made 48 *in forma pauperis* filings in this Court since the beginning of the October 1988 Term, many of which challenged sanctions imposed by lower courts for frivolous filings. Almost two years ago, we prospectively denied Demos leave to proceed *in forma pauperis* "in all future petitions for extraordinary relief." *In re Demos,* 500 U. S. 16, 17 (1991) *(per curiam).* At that time, we said that Demos "remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 39 and does not similarly abuse that privilege." *Ibid.*

Since then, Demos has filed 14 petitions for certiorari. We denied the first seven petitions outright, and denied Demos leave to proceed *in forma pauperis* under our Rule 39.8 as to the following six. Today, we invoke Rule 39.8 again with respect to the instant petition. Demos is allowed until March 29, 1993, within which to pay the docketing fees required by Rule 38 and to submit the petition in compliance with this Court's Rule 33. Because Demos has refused to heed our prior warning, we further direct the Clerk to reject all future petitions for certiorari from Demos in noncriminal matters unless he pays the docketing fee required by Rule 38 and submits his petition in compliance with Rule 33. See *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1, 1–2 (1992) *(per curiam).* Demos' continued course of abusive filings plainly warrants this sanction.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In my opinion, the administration of special procedures for disposing of repetitive and frivolous petitions is less efficient than our past practice of simply denying such petitions.* I continue to adhere to my previously stated views on this issue, see *Martin* v. *District of Columbia Court of Appeals,* 506 U. S. 1, 4 (1992) (STEVENS, J., dissenting); *Zatko* v. *California,* 502 U. S. 16, 18 (1991) (STEVENS, J., dissenting), and would deny certiorari rather than invoking Rule 39 in this case. Accordingly, I respectfully dissent.

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*The next issue the Court will confront in developing its Rule 39.8 jurisprudence, for instance, is whether to apply orders like today's retroactively, to petitions pending on the date they are issued.

RENO, ATTORNEY GENERAL, ET AL. *v.* FLORES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–905. Argued October 13, 1992—Decided March 23, 1993

Respondents are a class of alien juveniles arrested by the Immigration and Naturalization Service (INS) on suspicion of being deportable, and then detained pending deportation hearings pursuant to a regulation, promulgated in 1988 and codified at 8 CFR § 242.24, which provides for the release of detained minors only to their parents, close relatives, or legal guardians, except in unusual and compelling circumstances. An immigration judge will review the initial deportability and custody determinations upon request by the juvenile. § 242.2(d). Pursuant to a consent decree entered earlier in the litigation, juveniles who are not released must be placed in juvenile care facilities that meet or exceed state licensing requirements for the provision of services to dependent children. Respondents contend that they have a right under the Constitution and immigration laws to be routinely released into the custody of other "responsible adults." The District Court invalidated the regulatory scheme on unspecified due process grounds, ordering that "responsible adult part[ies]" be added to the list of persons to whom a juvenile must be released and requiring that a hearing before an immigration judge be held automatically, whether or not the juvenile requests it. The Court of Appeals, en banc, affirmed.

Held:

1. Because this is a facial challenge to the regulation, respondents must establish that no set of circumstances exists under which the regulation would be valid. *United States* v. *Salerno*, 481 U. S. 739, 745. Pp. 300–301.

2. Regulation 242.24, on its face, does not violate the Due Process Clause. Pp. 301–309.

(a) The regulation does not deprive respondents of "substantive due process." The substantive right asserted by respondents is properly described as the right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a private custodian rather than of a government-operated or government-selected child-care institution. That novel claim cannot be considered "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *United*

States v. *Salerno, supra,* at 751. It is therefore sufficient that the regulation is rationally connected to the government's interest in preserving and promoting the welfare of detained juveniles, and is not punitive since it is not excessive in relation to that valid purpose. Nor does each unaccompanied juvenile have a substantive right to an individualized hearing on whether private placement would be in his "best interests." Governmental custody must meet minimum standards, as the consent decree indicates it does here, but the decision to exceed those standards is a policy judgment, not a constitutional imperative. Any remaining constitutional doubts are eliminated by the fact that almost all respondents are aliens suspected of being deportable, a class that can be detained, and over which Congress has granted the Attorney General broad discretion regarding detention. 8 U. S. C. § 1252(a)(1). Pp. 301–306.

(b) Existing INS procedures provide alien juveniles with "procedural due process." Respondents' demand for an individualized custody hearing for each detained alien juvenile is merely the "substantive due process" argument recast in procedural terms. Nor are the procedures faulty because they do not require automatic review by an immigration judge of initial deportability and custody determinations. In the context of this facial challenge, providing the *right* to review suffices. It has not been shown that all of the juveniles detained are too young or ignorant to exercise that right; any waiver of a hearing is revocable; and there is no evidence of excessive delay in holding hearings when requested. Pp. 306–309.

3. The regulation does not exceed the scope of the Attorney General's discretion to continue custody over arrested aliens under 8 U. S. C. § 1252(a)(1). It rationally pursues a purpose that is lawful for the INS to seek, striking a balance between the INS's concern that the juveniles' welfare will not permit their release to just any adult and the INS's assessment that it has neither the expertise nor the resources to conduct home studies for individualized placements. The list of approved custodians reflects the traditional view that parents and close relatives are competent custodians, and otherwise defers to the States' proficiency in the field of child custody. The regulation is not motivated by administrative convenience; its use of presumptions and generic rules is reasonable; and the period of detention that may result is limited by the pending deportation hearing, which must be concluded with reasonable dispatch to avoid habeas corpus. Pp. 309–315.

942 F. 2d 1352, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which SOUTER, J., joined, *post*, p. 315. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 320.

Deputy Solicitor General Mahoney argued the cause for petitioners. With her on the briefs were *Solicitor General Starr, Assistant Attorney General Gerson, Ronald J. Mann, Michael Jay Singer,* and *John C. Hoyle.*

Carlos Holguin argued the cause for respondents. With him on the brief were *Peter A. Schey, Paul Hoffman, Mark Rosenbaum, James Morales, Alice Bussiere, Lucas Guttentag,* and *John A. Powell.**

JUSTICE SCALIA delivered the opinion of the Court.

Over the past decade, the Immigration and Naturalization Service (INS or Service) has arrested increasing numbers of alien juveniles who are not accompanied by their parents or other related adults. Respondents, a class of alien juveniles so arrested and held in INS custody pending their deportation hearings, contend that the Constitution and immigration laws require them to be released into the custody of "responsible adults."

I

Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing.[1] The Board of Immigration Appeals has stated that "[a]n alien generally . . . should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk." *Matter of Patel,* 15 I. & N. Dec. 666 (1976); cf. *INS* v. *National Center for Immigrants' Rights, Inc. (NCIR),* 502 U. S. 183 (1991) (upholding INS regulation imposing conditions upon release). In the case of arrested alien *juveniles,* however, the INS cannot simply send them off into the night on bond or recognizance. The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been detained and the family can be released together; it becomes complicated when the juvenile is arrested alone, *i. e.,* unaccompanied by a parent, guardian, or other related adult. This problem is a serious one, since the INS arrests thousands of alien juveniles each year (more than 8,500 in 1990 alone)—as many as 70% of them unaccompanied. Brief for Petitioners 8. Most of these minors are boys in their midteens, but perhaps 15% are girls and the same percentage 14 years of age or younger. See *id.,* at 9, n. 12; App. to Pet. for Cert. 177a.

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*Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Talbot D'Alemberte, Andrew S. Krulwich,* and *Christopher D. Cerf;* for Amnesty International U. S. A. by *Clara A. Pope;* for the Child Welfare League of America et al. by *J. Michael Klise, Clifton S. Elgarten,* and *John R. Heisse II;* for the Southwest Refugee Rights Project et al. by *Antonia Hernandez, Richard Larson, Susan M. Lydon,* and *Bill Ong Hing;* and for the United States Catholic Conference et al. by *William F. Abrams.*

For a number of years the problem was apparently dealt with on a regional and ad hoc basis, with some INS offices releasing unaccompanied alien juveniles not only to their parents but also to a range of other adults and organizations.

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[1] Title 8 U. S. C. §1252(a)(1), 66 Stat. 208, as amended, provides: "[A]ny such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole . . . may be revoked at any time by the Attorney General, in his discretion . . . ."

The Attorney General's discretion to release aliens convicted of aggravated felonies is narrower. See 8 U. S. C. § 1252(a)(2) (1988 ed., Supp. III).

In 1984, responding to the increased flow of unaccompanied juvenile aliens into California, the INS Western Regional Office adopted a policy of limiting the release of detained minors to "'a parent or lawful guardian,'" except in "'unusual and extraordinary cases,'" when the juvenile could be released to "'a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child.'" See *Flores* v. *Meese*, 934 F. 2d 991, 994 (CA9 1990) (quoting policy), vacated, 942 F. 2d 1352 (CA9 1991) (en banc).

In July of the following year, the four respondents filed an action in the District Court for the Central District of California on behalf of a class, later certified by the court, consisting of all aliens under the age of 18 who are detained by the INS Western Region because "a parent or legal guardian fails to personally appear to take custody of them." App. 29. The complaint raised seven claims, the first two challenging the Western Region release policy (on constitutional, statutory, and international law grounds), and the final five challenging the conditions of the juveniles' detention.

The District Court granted the INS partial summary judgment on the statutory and international law challenges to the release policy, and in late 1987 approved a consent decree that settled all claims regarding the detention conditions. The court then turned to the constitutional challenges to the release policy, and granted respondents partial summary judgment on their equal protection claim that the INS had no rational basis for treating alien minors in deportation proceedings differently from alien minors in exclusion proceedings[2] (whom INS regulations permitted to be paroled, in some circumstances, to persons other than parents and legal guardians, including other relatives and "friends," see 8 CFR § 212.5(a)(2)(ii) (1987)). This prompted the INS to initiate notice-and-comment rulemaking "to codify Service policy regarding detention and release of juvenile aliens and to provide a single policy for juveniles in both deportation and exclusion proceedings." 52 Fed. Reg. 38245 (1987). The District Court agreed to defer consideration of respondents' due process claims until the regulation was promulgated.

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[2] Exclusion proceedings, which are not at issue in the present case, involve aliens apprehended before "entering" the United States, as that term is used in the immigration laws. See *Leng May Ma* v. *Barber*, 357 U. S. 185, 187 (1958).

The uniform deportation-exclusion rule finally adopted, published on May 17, 1988, see Detention and Release of Juveniles, 53 Fed. Reg. 17449 (codified as to deportation at 8 CFR § 242.24 (1992)), expanded the possibilities for release somewhat beyond the Western Region policy, but not as far as many commenters had suggested. It provides that alien juveniles "shall be released, in order of preference, to: (i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who are *[sic]* not presently in INS detention," unless the INS determines that "the detention of such juvenile is required to secure his timely appearance before the Service or the immigration court or to ensure the juvenile's safety or that of others." 8 CFR § 242.24(b)(1) (1992). If the only listed individuals are in INS detention, the Service will consider simultaneous release of the juvenile and custodian "on a discretionary case-by-case basis." § 242.24(b)(2). A parent or legal guardian who is in INS custody or outside the United States may also, by sworn affidavit, designate another person as capable and willing to care for the child, provided that person "execute[s] an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings." § 242.24(b)(3). Finally, in "unusual and compelling circumstances and in the discretion of the [INS] district director or chief patrol agent," juveniles may be released to other adults who execute a care and attendance agreement. § 242.24(b)(4).

If the juvenile is *not* released under the foregoing provision, the regulation requires a designated INS official, the "Juvenile Coordinator," to locate "suitable placement . . . in a facility designated for the occupancy of juveniles."

§ 242.24(c). The Service may briefly hold the minor in an "INS detention facility having separate accommodations for juveniles," § 242.24(d), but under the terms of the consent decree resolving respondents' conditions-of-detention claims, the INS must within 72 hours of arrest place alien juveniles in a facility that meets or exceeds the standards established by the Alien Minors Care Program of the Community Relations Service (CRS), Department of Justice, 52 Fed. Reg. 15569 (1987). See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, *Flores* v. *Meese*, No. 85–4544–RJK (Px) (CD Cal., Nov. 30, 1987) (incorporating the CRS notice and program description), reprinted in App. to Pet. for Cert. 148a–205a (hereinafter Juvenile Care Agreement).

Juveniles placed in these facilities are deemed to be in INS detention "because of issues of payment and authorization of medical care." 53 Fed. Reg., at 17449. "Legal custody" rather than "detention" more accurately describes the reality of the arrangement, however, since these are not correctional institutions but facilities that meet "state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children," Juvenile Care Agreement 176a, and are operated "in an open type of setting without a need for extraordinary security measures," *id.*, at 173a. The facilities must provide, in accordance with "applicable state child welfare statutes and generally accepted child welfare standards, practices, principles and procedures," *id.*, at 157a, an extensive list of services, including physical care and maintenance, individual and group counseling, education, recreation and leisure-time activities, family reunification services, and access to religious services, visitors, and legal assistance, *id.*, at 159a, 178a–185a.

Although the regulation replaced the Western Region release policy that had been the focus of respondents' constitutional claims, respondents decided to maintain the litigation as a challenge to the new rule. Just a week after the regulation took effect, in a brief, unpublished order that referred only to unspecified "due process grounds," the District Court granted summary judgment to respondents and invalidated the regulatory scheme in three important respects. *Flores* v. *Meese*, No. CV 85–4544–RJK (Px) (CD Cal., May 25, 1988), App. to Pet. for Cert. 146a. First, the court ordered the INS to release "any minor otherwise eligible for release . . . to his parents, guardian, custodian, conservator, *or other responsible adult party.*" *Ibid.* (emphasis added). Second, the order dispensed with the regulation's requirement that unrelated custodians formally agree to *care for* the juvenile, 8 CFR §§ 242.24(b)(3) and (4) (1992), in addition to ensuring his attendance at future proceedings. Finally, the District Court rewrote the related INS regulations that provide for an initial determination of prima facie deportability and release conditions before an INS examiner, see § 287.3, with review by an immigration judge upon the alien's request, see § 242.2(d). It decreed instead that an immigration-judge hearing on probable cause and release restrictions should be provided "forthwith" after arrest, whether or not the juvenile requests it. App. to Pet. for Cert. 146a.

A divided panel of the Court of Appeals reversed. *Flores* v. *Meese*, 934 F. 2d 991 (CA9 1990). The Ninth Circuit voted to rehear the case and selected an 11-judge en banc court. See Ninth Circuit Rule 35–3. That court vacated the panel opinion and affirmed the District Court order "in all respects." *Flores* v. *Meese*, 942 F. 2d 1352, 1365 (1991). One judge dissented in part, see *id.*, at 1372–1377 (opinion of Rymer, J.), and four *in toto*, see *id.*, at 1377–1385 (opinion of Wallace, C. J.). We granted certiorari. 503 U. S. 905 (1992).

II

Respondents make three principal attacks upon INS regulation 242.24. First, they assert that alien juveniles suspected of being deportable have a "fundamental" right to "freedom from physical restraint," Brief for Respondents 16, and it is therefore a denial of "substantive due process" to detain them, since the Service cannot prove that it is pursuing an important governmental interest in a manner narrowly tailored to minimize the restraint on liberty. Second, respondents argue that the regulation violates "procedural due process," because it does not require the Service to determine, with regard to *each individual* detained juvenile who lacks an approved custodian, whether his best interests lie in remaining in INS custody or in release to some other "responsible adult." Finally, respondents contend that even if the INS regulation infringes no constitutional rights, it exceeds the Attorney General's authority under 8 U. S. C. § 1252(a)(1). We find it economic to discuss the objections in that order, though we of course reach the constitutional issues only because we conclude that the respondents' statutory argument fails.[3]

Before proceeding further, however, we make two important observations. First, this is a facial challenge to INS regulation 242.24. Respondents do not challenge its application in a particular instance; it had not yet been applied in a particular instance—because it was not yet in existence—when their suit was brought (directed at the 1984 Western Region release policy), and it had been in effect only a week when the District Court issued the judgment invalidating it. We have before us no findings of fact, indeed no record, concerning the INS's interpretation of the regulation or the history of its enforcement. We have only the regulation itself and the statement of basis and purpose that accompanied its promulgation. To prevail in such a facial challenge, respondents "must establish that no set of circumstances exists under which the [regulation] would be valid." *United States* v. *Salerno,* 481 U. S. 739, 745 (1987). That is true as to both the constitutional challenges, see *Schall* v. *Martin,* 467 U. S. 253, 268, n. 18 (1984), and the statutory challenge, see *NCIR,* 502 U. S., at 188.

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[3] The District Court and all three judges on the Court of Appeals panel held in favor of the INS on this statutory claim, see *Flores* v. *Meese*, 934 F. 2d 991, 995, 997–1002 (CA9 1991); *id.*, at 1015 (Fletcher, J., dissenting); the en banc court (curiously) did not address the claim, proceeding immediately to find the rule unconstitutional. Although respondents did not cross-petition for certiorari on the statutory issue, they may legitimately defend their judgment on any ground properly raised below. See *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 476, n. 20 (1979). The INS does not object to our considering the issue, and we do so in order to avoid deciding constitutional questions unnecessarily. See *Jean* v. *Nelson*, 472 U. S. 846, 854 (1985).

The second point is related. Respondents spend much time, and their *amici* even more, condemning the conditions under which some alien juveniles are held, alleging that the conditions are so severe as to belie the Service's stated reasons for retaining custody—leading, presumably, to the conclusion that the retention of custody is an unconstitutional infliction of punishment without trial. See *Salerno, supra,* at 746–748; *Wong Wing* v. *United States,* 163 U. S. 228, 237 (1896). But whatever those conditions might have been when this litigation began, they are now (at least in the Western Region, where all members of the respondents' class are held) presumably in compliance with the extensive requirements set forth in the Juvenile Care Agreement that settled respondents' claims regarding detention conditions, see *supra,* at 298. The settlement agreement entitles respondents to enforce compliance with those requirements in the District Court, see Juvenile Care Agreement 148a–149a, which they acknowledge they have not done, Tr. of Oral Arg. 43. We will disregard the effort to reopen those settled claims by alleging, for purposes of the challenges to the regulation, that the detention conditions are other than what the consent decree says they must be.

III

Respondents' "substantive due process" claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of "due process of law" to include a substantive component, which forbids the government to infringe certain "fundamental" liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. See, *e. g., Collins* v. *Harker Heights,* 503 U. S. 115, 125 (1992); *Salerno, supra,* at 746; *Bowers* v. *Hardwick,* 478 U. S. 186, 191 (1986). "Substantive due process" analysis must begin with a careful description of the asserted right, for "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins, supra,* at 125; see *Bowers* v. *Hardwick, supra,* at 194–195. The "freedom from physical restraint" invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells, given the Juvenile Care Agreement. Nor even in the sense of a right to come and go at will, since, as we have said elsewhere, "juveniles, unlike adults, are always in some form of custody," *Schall,* 467 U. S., at 265, and where the custody of the parent or legal guardian fails, the government may (indeed, we have said *must*) either exercise custody itself or appoint someone else to do so. *Ibid.* Nor is the right asserted the right of a child to be released from all other custody into the custody of its parents, legal guardian, or even close relatives: The challenged regulation requires such release when it is sought. Rather, the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution.

If there exists a fundamental right to be released into what respondents inaccurately call a "non-custodial setting," Brief for Respondents 18, we see no reason why it would apply only in the context of government custody incidentally acquired in the course of law enforcement. It would presumably apply to state custody over orphans and abandoned children as well, giving federal law and federal courts a major new role in the management of state orphanages and other child-care institutions. Cf. *Ankenbrandt* v. *Richards,* 504 U. S. 689, 703–704 (1992). We are unaware, however, that any court—aside from the courts below—has ever held that a child has a constitutional right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child's legal guardian but willing to undertake temporary legal custody. The mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it; the alleged right certainly cannot be considered "'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Salerno, supra,* at 751 (quoting *Snyder* v. *Massachusetts,* 291 U. S. 97, 105 (1934)). Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in "preserving and promoting the welfare of the child," *Santosky* v. *Kramer,* 455 U. S. 745, 766 (1982), and is not punitive since it is not excessive in relation to that valid purpose. See *Schall, supra,* at 269.

Although respondents generally argue for the categorical right of private placement discussed above, at some points they assert a somewhat more limited constitutional right: the right to an individualized hearing on whether private placement would be in the child's "best interests"—followed by private placement if the answer is in the affirmative. It seems to us, however, that if institutional custody (despite the availability of responsible private custodians) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other arrangement for the particular child. "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately.* See *Quilloin* v. *Walcott,* 434 U. S. 246, 255 (1978). Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves. See, *e. g., R. C. N.* v. *State,* 141 Ga. App. 490, 491, 233 S. E. 2d 866, 867 (1977).

"The best interests of the child" is likewise not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities. Thus, child-care institutions operated by the State in the exercise of its *parens patriae* authority, see *Schall, supra,* at 265, are not constitutionally required to be funded at such a level as to provide the *best* schooling or the *best* health care available; nor does the Constitution require them to substitute, wherever possible, private nonadoptive custody for institutional care. And the same principle applies, we think, to the governmental responsibility at issue here, that of retaining or transferring custody over a child who has come within the Federal Government's control, when the parents or guardians of that child are nonexistent or unavailable. Minimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond those requirements—to give one or another of the child's additional interests priority over other concerns that compete for public funds and administrative attention—is a policy judgment rather than a constitutional imperative.

Respondents' "best interests" argument is, in essence, a demand that the INS program be narrowly tailored to minimize the denial of release into private custody. But narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest (here, the alleged interest in being released into the custody of strangers) demands no more than a "reasonable fit" between governmental purpose (here, protecting the welfare of the juveniles who have come into the Government's custody) and the means chosen to advance that purpose. This leaves ample room for an agency to decide, as the INS has, that administrative factors such as lack of child-placement expertise favor using one means rather than another. There is, in short, no constitutional need for a hearing to determine whether private placement would be better, so long as institutional custody is (as we readily find it to be, assuming compliance with the requirements of the consent decree) good enough.

If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles (concededly the overwhelming majority of all involved here) who are aliens. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976). "'[O]ver no conceivable subject is the legislative power of Congress more complete.'" *Fiallo* v. *Bell*, 430 U. S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909)). Thus, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" 430 U. S., at 792 (quoting *Mathews* v. *Diaz, supra,* at 79–80). Respondents do not dispute that Congress has the authority to detain aliens suspected of entering the country illegally pending their deportation hearings, see *Carlson* v. *Landon,* 342 U. S. 524, 538 (1952); *Wong Wing* v. *United States,* 163 U. S., at 235. And in enacting the precursor to 8 U. S. C. § 1252(a), Congress eliminated any presumption of release pending deportation, committing that determination to the discretion of the Attorney General. See *Carlson* v. *Landon, supra,* at 538–540. Of course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose—which it does, as we shall discuss later in connection with the statutory challenge.

Respondents also argue, in a footnote, that the INS release policy violates the "equal protection guarantee" of the Fifth Amendment because of the disparate treatment evident in (1) releasing alien juveniles with close relatives or legal guardians but detaining those without, and (2) releasing to unrelated adults juveniles detained pending federal delinquency proceedings, see 18 U. S. C. § 5034, but detaining unaccompanied alien juveniles pending deportation proceedings. The tradition of reposing custody in close relatives and legal guardians is in our view sufficient to support the former distinction; and the difference between citizens and aliens is adequate to support the latter.

IV

We turn now from the claim that the INS cannot deprive respondents of their asserted liberty interest *at all,* to the "procedural due process" claim that the Service cannot do so on the basis of the procedures it provides. It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. See *The Japanese Immigrant Case,* 189 U. S. 86, 100–101 (1903). To determine whether these alien juveniles have received it here, we must first review in some detail the procedures the INS has employed.

Though a procedure for obtaining warrants to arrest named individuals is available, see 8 U. S. C. § 1252(a)(1); 8 CFR § 242.2(c)(1) (1992), the deportation process ordinarily begins with a warrantless arrest by an INS officer who has reason to believe that the arrestee "is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained," 8 U. S. C. § 1357(a)(2). Arrested aliens are almost always offered the choice of departing the country voluntarily, 8 U. S. C. § 1252(b) (1988 ed., Supp. III); 8 CFR § 242.5 (1992), and as many as 98% of them take that course. See *INS* v. *Lopez-Mendoza,* 468 U. S. 1032, 1044 (1984). Before the Service seeks execution of a voluntary departure form by a *juvenile,* however, the juvenile "must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list." 8 CFR § 242.24(g) (1992).[4] If the juvenile does not seek voluntary departure, he must be brought before an INS examining officer within 24 hours of his arrest. § 287.3; see 8 U. S. C. § 1357(a)(2). The examining officer is a member of the Service's enforcement staff, but must be someone other than the arresting officer (unless no other qualified examiner is readily available). 8 CFR § 287.3 (1992). If the examiner determines that "there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws," *ibid.,* a formal deportation proceeding is initiated through the issuance of an order to show cause, § 242.1, and within 24 hours the decision is made whether to continue the alien juvenile in custody or release him, § 287.3.

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[4] Alien juveniles from Canada and Mexico must be offered the opportunity to make a telephone call but need not in fact do so, see 8 CFR § 242.24(g) (1992); the United States has treaty obligations to notify diplomatic or consular officers of those countries whenever their nationals are detained, see § 242.2(g).

The INS notifies the alien of the commencement of a deportation proceeding and of the decision as to custody by serving him with a Form I–221S (reprinted in App. to Brief for Petitioners 7a–8a) which, pursuant to the Immigration Act of 1990, 8 U. S. C. § 1252b(a)(3)(A) (1988 ed., Supp. III), must be in English and Spanish. The front of this form notifies the alien of the allegations against him and the date of his deportation hearing. The back contains a section entitled "NOTICE OF CUSTODY DETERMINATION," in which the INS officer checks a box indicating whether the alien will be detained in the custody of the Service, released on recognizance, or released under bond. Beneath these boxes, the form states: "You may request the Immigration Judge to redetermine this decision." See 8 CFR § 242.2(c)(2) (1992). (The immigration judge is a quasi-judicial officer in the Executive Office for Immigration Review, a division separated from the Service's enforcement staff. § 3.10.) The alien must check either a box stating "I do" or a box stating "[I] do not request a redetermination by an Immigration Judge of the custody decision," and must then sign and date this section of the form. If the alien requests a hearing and is dissatisfied with the outcome, he may obtain further review by the Board of Immigration Appeals, § 242.2(d); § 3.1(b)(7), and by the federal courts, see, *e. g., Carlson* v. *Landon, supra,* at 529, 531.

Respondents contend that this procedural system is unconstitutional because it does not require the Service to determine in the case of each individual alien juvenile that detention in INS custody would better serve his interests than release to some other "responsible adult." This is just the "substantive due process" argument recast in "procedural due process" terms, and we reject it for the same reasons.

The District Court and the en banc Court of Appeals concluded that the INS procedures are faulty because they do not provide for *automatic* review by an immigration judge of the initial deportability and custody determinations. See

942 F. 2d, at 1364. We disagree. At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge. It has not been shown that all of them are too young or too ignorant to exercise that right when the form asking them to assert or waive it is presented. Most are 16 or 17 years old and will have been in telephone contact with a responsible adult outside the INS—sometimes a legal services attorney. The waiver, moreover, is revocable: The alien may request a judicial redetermination at any time later in the deportation process. See 8 CFR § 242.2(d) (1992); *Matter of Uluocha,* Interim Dec. 3124 (BIA 1989). We have held that juveniles are capable of "knowingly and intelligently" waiving their right against self-incrimination in criminal cases. See *Fare* v. *Michael C.,* 442 U. S. 707, 724–727 (1979); see also *United States* v. *Saucedo-Velasquez,* 843 F. 2d 832, 835 (CA5 1988) (applying *Fare* to alien juvenile). The alleged right to redetermination of prehearing custody status in deportation cases is surely no more significant.

Respondents point out that the regulations do not set a time period within which the immigration-judge hearing, if requested, must be held. But we will not assume, on this facial challenge, that an excessive delay will invariably ensue—particularly since there is no evidence of such delay, even in isolated instances. Cf. *Matter of Chirinos,* 16 I. & N. Dec. 276 (BIA 1977).

V

Respondents contend that the regulation goes beyond the scope of the Attorney General's discretion to continue custody over arrested aliens under 8 U. S. C. § 1252(a)(1). That contention must be rejected if the regulation has a " 'reasonable foundation,' " *Carlson* v. *Landon,* 342 U. S., at 541, that is, if it rationally pursues a purpose that it is lawful for the INS to seek. See also *NCIR,* 502 U. S., at 194. We think that it does.

The statement of basis and purpose accompanying promulgation of regulation 242.24, in addressing the question "as to whose custody the juvenile should be released," began with the dual propositions that "concern for the welfare of the juvenile will not permit release to just any adult" and that "the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released." Detention and Release of Juveniles, 53 Fed. Reg. 17449 (1988). The INS decided to "strik[e] a balance" by defining a list of presumptively appropriate custodians while maintaining the discretion of local INS directors to release detained minors to other custodians in "unusual and compelling circumstances." *Ibid.* The list begins with parents, whom our society and this Court's jurisprudence have always presumed to be the preferred and primary custodians of their minor children. See *Parham* v. *J. R.*, 442 U. S. 584, 602–603 (1979). The list extends to other close blood relatives, whose protective relationship with children our society has also traditionally respected. See *Moore* v. *East Cleveland,* 431 U. S. 494 (1977); cf. *Village of Belle Terre* v. *Boraas,* 416 U. S. 1 (1974). And finally, the list includes persons given legal guardianship by the States, which we have said possess "special proficiency" in the field of domestic relations, including child custody. *Ankenbrandt* v. *Richards,* 504 U. S., at 704. When neither parent, close relative, or state-appointed guardian is immediately available,[5] the INS will normally keep legal custody of the juvenile, place him in a government-supervised and state-licensed shelter-care facility, and continue searching for a relative or guardian, although release to others is possible in unusual cases.[6]

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[5] The regulation also provides for release to any person designated by a juvenile's parent or guardian as "capable and willing to care for the juvenile's well-being." 8 CFR § 242.24(b)(3) (1992). "[To] ensur[e] that the INS is actually receiving the wishes of the parent or guardian," 53 Fed. Reg. 17450 (1988), the designation must be in the form of a sworn affidavit executed before an immigration or consular officer.

Respondents object that this scheme is motivated purely by "administrative convenience," a charge echoed by the dissent, see, *e. g., post,* at 320. This fails to grasp the distinction between administrative convenience (or, to speak less pejoratively, administrative efficiency) as the *purpose* of a policy—for example, a policy of not considering late-filed objections—and administrative efficiency as the reason for selecting one means of achieving a purpose over another. Only the latter is at issue here. The requisite statement of basis and purpose published by the INS upon promulgation of regulation 242.24 declares that the purpose of the rule is to protect "the welfare of the juvenile," 53 Fed. Reg. 17449 (1988), and there is no basis for calling that false. (Respondents' contention that the real purpose was to save money imputes not merely mendacity but irrationality, since respondents point out that detention in shelter-care facilities is more expensive than release.) Because the regulation involves no deprivation of a "fundamental" right, the Service was not compelled to ignore the costs and difficulty of alternative means of advancing its declared goal. Cf. *Stanley* v.

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[6] The dissent maintains that, in making custody decisions, the INS cannot rely on "[c]ategorical distinctions between cousins and uncles, or between relatives and godparents or other responsible persons," because "[d]ue process demands more, far more." *Post,* at 343. Acceptance of such a proposition would revolutionize much of our family law. Categorical distinctions between relatives and nonrelatives, and between relatives of varying degree of affinity, have always played a predominant role in determining child custody and in innumerable other aspects of domestic relations. The dissent asserts, however, that it would prohibit such distinctions only for the purpose of "prefer[ring] *detention* [by which it means institutional detention] to *release,*" and accuses us of "mischaracteriz[ing] the issue" in suggesting otherwise. *Post,* at 343, n. 29. It seems to us that the dissent mischaracterizes the issue. The INS uses the categorical distinction between relatives and nonrelatives not to deny release, but to determine which potential custodians will be accepted without the safeguard of state-decreed guardianship.

Illinois, 405 U. S. 645, 656–657 (1972). It is impossible to contradict the Service's assessment that it lacks the "expertise," and is not "qualified," to do individualized child-placement studies, 53 Fed. Reg. 17449 (1988), and the right alleged here provides no basis for this Court to impose upon what is essentially a law enforcement agency the obligation to expend its limited resources in developing such expertise and qualification.[7] That reordering of priorities is for Congress—which has shown, we may say, no inclination to shrink from the task. See, *e. g.*, 8 U. S. C. § 1154(c) (requiring INS to determine if applicants for immigration are involved in "sham" marriages). We do not hold, as the dissent contends, that "minimizing administrative costs" is adequate justification for the Service's detention of juveniles, *post*, at 320; but we do hold that a detention program justified by the need to protect the welfare of juveniles is not constitutionally required to give custody to strangers if that entails the expenditure of administrative effort and resources that the Service is unwilling to commit.[8]

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[7] By referring unrelated persons seeking custody to state guardianship procedures, the INS is essentially drawing upon resources and expertise that are already in place. Respondents' objection to this is puzzling, in light of their assertion that the States generally view unrelated adults as appropriate custodians. See *post*, at 325–326, n. 7 (STEVENS, J., dissenting) (collecting state statutes). If that is so, one wonders why the individuals and organizations respondents allege are eager to accept custody do not rush to state court, have themselves appointed legal guardians (temporary or permanent, the States have procedures for both), and then obtain the juveniles' release under the terms of the regulation. Respondents and their *amici* do maintain that becoming a guardian can be difficult, but the problems they identify—delays in processing, the need to ensure that existing parental rights are not infringed, the "bureaucratic gauntlet"—would be no less significant were the INS to duplicate existing state procedures.

[8] We certainly agree with the dissent that this case must be decided in accordance with "indications of congressional policy," *post*, at 334. The most pertinent indication, however, is not, as the dissent believes, the federal statute governing detention of juveniles pending delinquency

Respondents also contend that the INS regulation violates the statute because it relies upon a "blanket" presumption of the unsuitability of custodians other than parents, close relatives, and guardians. We have stated that, at least in certain contexts, the Attorney General's exercise of discretion under § 1252(a)(1) requires "some level of individualized determination." *NCIR,* 502 U. S., at 194; see also *Carlson* v. *Landon,* 342 U. S., at 538. But as *NCIR* itself demonstrates, this does not mean that the Service must forswear use of reasonable presumptions and generic rules. See 502 U. S., at 196, n. 11; cf. *Heckler* v. *Campbell,* 461 U. S. 458, 467 (1983). In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation: Is there reason to believe the alien deportable? Is the alien under 18 years of age? Does the alien have an avail-

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proceedings, 18 U. S. C. § 5034, but the statute under which the Attorney General is here acting, 8 U. S. C. § 1252(a)(1). That grants the Attorney General *discretion* to determine when temporary detention pending deportation proceedings is appropriate, and makes his exercise of that discretion "presumptively correct and unassailable except for abuse." *Carlson* v. *Landon,* 342 U. S. 524, 540 (1952). We assuredly cannot say that the decision to rely on universally accepted presumptions as to the custodial competence of parents and close relatives, and to defer to the expertise of the States regarding the capabilities of other potential custodians, is an abuse of this broad discretion simply because it does not track policies applicable outside the immigration field. See *NCIR,* 502 U. S. 183, 193–194 (1991). Moreover, reliance upon the States to determine guardianship is quite in accord with what Congress has directed in other immigration contexts. See 8 U. S. C. § 1154(d) (INS may not approve immigration petition for an alien juvenile orphan being adopted unless "a valid home-study has been favorably recommended by an agency of the State of the child's proposed residence, or by an agency authorized by that State to conduct such a study"); § 1522(d)(2)(B)(ii) (for refugee children unaccompanied by parents or close relatives, INS shall "attempt to arrange . . . placement under the laws of the States"); see also 45 CFR § 400.113 (1992) (providing support payments under § 1522 until the refugee juvenile is placed with a parent or with another adult "to whom legal custody and/or guardianship is granted under State law").

able adult relative or legal guardian? Is the alien's case so exceptional as to require consideration of release to someone else? The particularization and individuation need go no further than this.[9]

Finally, respondents claim that the regulation is an abuse of discretion because it permits the INS, once having determined that an alien juvenile lacks an available relative or legal guardian, to hold the juvenile in detention indefinitely. That is not so. The period of custody is inherently limited by the pending deportation hearing, which must be concluded with "reasonable dispatch" to avoid habeas corpus. 8 U. S. C. § 1252(a)(1); cf. *United States* v. *Salerno*, 481 U. S., at 747 (noting time limits placed on pretrial detention by the Speedy Trial Act). It is expected that alien juveniles will remain in INS custody an average of only 30 days. See Juvenile Care Agreement 178a. There is no evidence that alien juveniles are being held for undue periods pursuant to regulation 242.24, or that habeas corpus is insufficient to remedy particular abuses.[10] And the reasonableness of the

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[9] The dissent would mandate fully individualized custody determinations for two reasons. First, because it reads *Carlson* v. *Landon*, *supra*, as holding that the Attorney General may not employ "mere presumptions" in exercising his discretion. *Post*, at 337. But it was only the *dissenters* in *Carlson* who took such a restrictive view. See 342 U. S., at 558–559, 563–564, 568 (Frankfurter, J., dissenting). Second, because it believes that § 1252(a) must be interpreted to require individualized hearings in order to avoid "'constitutional doubts.'" *Post*, at 334 (quoting *United States* v. *Witkovich*, 353 U. S. 194, 199 (1957)); see *post*, at 339–340. The "constitutional doubts" argument has been the last refuge of many an interpretive lost cause. Statutes should be interpreted to avoid *serious* constitutional doubts, *Witkovich*, *supra*, at 202, not to eliminate all possible contentions that the statute *might* be unconstitutional. We entertain no serious doubt that the Constitution does not require any more individuation than the regulation provides, see *supra*, at 303–305, 309, and thus find no need to supplement the text of § 1252(a).

[10] The dissent's citation of a single deposition from 1986, *post*, at 323, and n. 6, is hardly proof that "excessive delay" will result in the "typical" case, *post*, at 324, under regulation 242.24, which was not promulgated until mid-1988.

Service's negative assessment of putative custodians who fail to obtain legal guardianship would seem, if anything, to increase as time goes by.

* * *

We think the INS policy now in place is a reasonable response to the difficult problems presented when the Service arrests unaccompanied alien juveniles. It may well be that other policies would be even better, but "we are [not] a legislature charged with formulating public policy." *Schall* v. *Martin*, 467 U. S., at 281. On its face, INS regulation 242.24 accords with both the Constitution and the relevant statute.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion and write separately simply to clarify that in my view these children have a constitutionally protected interest in freedom from institutional confinement. That interest lies within the core of the Due Process Clause, and the Court today does not hold otherwise. Rather, we reverse the decision of the Court of Appeals because the INS program challenged here, on its face, complies with the requirements of due process.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992). "Freedom from bodily restraint" means more than freedom from handcuffs, straitjackets, or detention cells. A person's core liberty interest is also implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution, even if the conditions of confinement are liberal. This is clear beyond cavil, at least where adults are concerned. "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause . . . ." *DeShaney* v. *Winnebago County Dept. of Social Services,* 489 U. S. 189, 200 (1989). The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny. There must be a "sufficiently compelling" governmental interest to justify such action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community. *United States* v. *Salerno,* 481 U. S. 739, 748 (1987); see *Foucha, supra,* at 80–81.

Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional "[f]reedom from bodily restraint" is no narrower than an adult's. Beginning with *In re Gault,* 387 U. S. 1 (1967), we consistently have rejected the assertion that "a child, unlike an adult, has a right 'not to liberty but to custody.'" *Id.,* at 17. *Gault* held that a child in delinquency proceedings must be provided various procedural due process protections (notice of charges, right to counsel, right of confrontation and cross-examination, privilege against self-incrimination) when those proceedings may result in the child's institutional confinement. As we explained:

> "Ultimately, however, we confront the reality of . . . the Juvenile Court process . . . . A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home'

> or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a building with whitewashed walls, regimented routine and institutional hours. Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, [and] state employees . . . ." *Id.*, at 27 (footnote and internal quotation marks omitted).

See also *In re Winship*, 397 U. S. 358 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); *Breed* v. *Jones*, 421 U. S. 519 (1975) (double jeopardy protection applies to delinquency proceedings); *Parham* v. *J. R.*, 442 U. S. 584 (1979) (proceedings to commit child to mental hospital must satisfy procedural due process).

Our decision in *Schall* v. *Martin*, 467 U. S. 253 (1984), makes clear that children have a protected liberty interest in "freedom from institutional restraints," *id.*, at 265, even absent the stigma of being labeled "delinquent," see *Breed*, *supra*, at 529, or "mentally ill," see *Parham*, *supra*, at 600–601. In *Schall*, we upheld a New York statute authorizing pretrial detention of dangerous juveniles, but only after analyzing the statute at length to ensure that it complied with substantive and procedural due process. We recognized that children "are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." 467 U. S., at 265. But this *parens patriae* purpose was seen simply as a plausible *justification* for state action implicating the child's protected liberty interest, not as a limitation on the scope of due process protection. See *ibid.* Significantly, *Schall* was essentially a facial challenge, as is this case, and New York's policy was to detain some juveniles in "open facilit[ies] in the community . . . without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities." *Id.*, at 271. A child's placement in this kind of governmental institution is hardly the same as handcuffing her, or confining her to a cell, yet it must still satisfy heightened constitutional scrutiny.

It may seem odd that institutional placement as such, even where conditions are decent and humane and where the child has no less authority to make personal choices than she would have in a family setting, nonetheless implicates the Due Process Clause. The answer, I think, is this. Institutionalization is a decisive and unusual event. "The consequences of an erroneous commitment decision are more tragic where children are involved. [C]hildhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives." *Parham, supra,* at 627–628 (footnotes omitted) (opinion of Brennan, J.). Just as it is true that "[i]n our society liberty [for adults] is the norm, and detention prior to trial or without trial is the carefully limited exception," *Salerno, supra,* at 755, so too, in our society, children normally grow up in families, not in governmental institutions. To be sure, government's failure to take custody of a child whose family is unable to care for her may also effect harm. But the purpose of heightened scrutiny is not to prevent government from placing children in an institutional setting, where necessary. Rather, judicial review ensures that government acts in this sensitive area with the requisite care.

In sum, this case does not concern the scope of the Due Process Clause. We are not deciding whether the constitutional concept of "liberty" extends to some hitherto unprotected aspect of personal well-being, see, *e. g., Collins* v. *Harker Heights,* 503 U. S. 115 (1992); *Michael H.* v. *Gerald D.,* 491 U. S. 110 (1989); *Bowers* v. *Hardwick,* 478 U. S. 186 (1986), but rather whether a governmental decision implicating a squarely protected liberty interest comports with substantive and procedural due process. See *ante,* at 301–306 (substantive due process scrutiny); *ante*, at 306–309 (procedural due process scrutiny). Specifically, the absence of available parents, close relatives, or legal guardians to care for respondents does not vitiate their constitutional interest in freedom from institutional confinement. It does not place that interest outside the core of the Due Process Clause. Rather, combined with the Juvenile Care Agreement, the fact that the normal forms of custody have faltered explains why the INS program facially challenged here survives heightened, substantive due process scrutiny. "Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in 'preserving and promoting the welfare of the child,' *Santosky* v. *Kramer*, 455 U. S. 745, 766 (1982), and is not punitive since it is not excessive in relation to that valid purpose." *Ante*, at 303. Because this is a facial challenge, the Court rightly focuses on the Juvenile Care Agreement. It is proper to presume that the conditions of confinement are no longer "'most disturbing,'" *Flores* v. *Meese*, 942 F. 2d 1352, 1358 (CA9 1991) (en banc) (quoting *Flores* v. *Meese*, 934 F. 2d 991, 1014 (CA9 1990) (Fletcher, J., dissenting)), and that the purposes of confinement are no longer the troublesome ones of lack of resources and expertise published in the Federal Register, see 53 Fed. Reg. 17449 (1988), but rather the plainly legitimate purposes associated with the Government's concern for the welfare of the minors. With those presumptions in place, "the terms and conditions of confinement . . . are in fact compatible with [legitimate] purposes," *Schall*, *supra*, at 269, and the Court finds that the INS program conforms with the Due Process Clause. On this understanding, I join the opinion of the Court.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The Court devotes considerable attention to debunking the notion that "the best interests of the child" is an "absolute and exclusive" criterion for the Government's exercise of the custodial responsibilities that it undertakes. *Ante,* at 304. The Court reasons that as long as the conditions of detention are "good enough," *ante,* at 305, the Immigration and Naturalization Service (INS or Agency) is perfectly justified in declining to expend administrative effort and resources to minimize such detention. *Ante,* at 305, 311–312.

As I will explain, I disagree with that proposition, for in my view, an agency's interest in minimizing administrative costs is a patently inadequate justification for the detention of harmless children, even when the conditions of detention are "good enough."[1] What is most curious about the Court's analysis, however, is that the INS *itself* vigorously denies that its policy is motivated even in part by a desire to avoid the administrative burden of placing these children in the care of "other responsible adults." Reply Brief for Petitioners 4. That is, while the Court goes out of its way to attack "the best interest of the child" as a criterion for judging the INS detention policy, it is precisely that interest that the INS invokes as the sole basis for its refusal to release these children to "other responsible adults":

> "[T]he articulated basis for the detention is that it furthers the government's interest in ensuring the welfare of the juveniles in its custody. . . .
>
> "[Respondents] argu[e] that INS's interest in furthering juvenile welfare does not in fact support the policy

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[1] Though the concurring JUSTICES join the Court's opinion, they too seem to reject the notion that the fact that "other concerns . . . compete for public funds and administrative attention," *ante,* at 305, is a sufficient justification for the INS' policy of refusing to make individualized determinations as to whether these juveniles should be detained. *Ante,* at 319 (concurring opinion).

> because INS has a 'blanket' policy that requires detention without any factual showing that detention is necessary to ensure respondents' welfare. . . . That argument, however, represents nothing more than a policy disagreement, because it criticizes INS for failing to pursue a view of juvenile welfare that INS has not adopted, namely the view held by respondent: that it is better for alien juveniles to be released to unrelated adults than to be cared for in suitable, government-monitored juvenile-care facilities, except in those cases where the government has knowledge that the particular adult seeking custody is unfit. The policy adopted by INS, reflecting the traditional view of our polity that parents and guardians are the most reliable custodians for juveniles, is that it is inappropriate to release alien juveniles—whose troubled background and lack of familiarity with our society and culture, give them particularized needs not commonly shared by domestic juveniles—to adults who are not their parents or guardians." *Id.*, at 4–5 (internal citations, emphasis, and quotation marks omitted).

Possibly because of the implausibility of the INS' claim that it has made a reasonable judgment that detention in government-controlled or government-sponsored facilities is "better" or more "appropriate" for these children than release to independent *responsible* adults, the Court reaches out to justify the INS policy on a ground not only not argued, but expressly disavowed by the INS, that is, the tug of "other concerns that compete for public funds and administrative attention," *ante*, at 305. I cannot share my colleagues' eagerness for that aggressive tack in a case involving a substantial deprivation of liberty. Instead, I will begin where the INS asks us to begin, with its assertion that its policy is justified by its interest in protecting the welfare of these children. As I will explain, the INS' decision to detain these juveniles despite the existence of responsible adults willing and able to assume custody of them is contrary to federal policy, is belied by years of experience with both citizen and alien juveniles, and finds no support whatsoever in the administrative proceedings that led to the promulgation of the Agency's regulation. I will then turn to the Court's statutory and constitutional analysis and explain why this ill-conceived and ill-considered regulation is neither authorized by § 242(a) of the Immigration and Nationality Act nor consistent with fundamental notions of due process of law.

At the outset, it is important to emphasize two critical points. First, this case involves the institutional detention of juveniles who pose no risk of flight and no threat of harm to themselves or to others. They are children who have responsible third parties available to receive and care for them; many, perhaps most, of them will never be deported.[2] It makes little difference that juveniles, unlike adults, are always in some form of custody, for detention in an institution pursuant to the regulation is vastly different from release to a responsible person—whether a cousin,[3] a godparent, a friend, or a charitable organization—willing to assume responsibility for the juvenile for the time the child would otherwise be detained.[4] In many ways the difference is comparable to the difference between imprisonment and probation or parole. Both conditions can be described as "legal custody," but the constitutional dimensions of individual "liberty" identify the great divide that separates the two. See *Morrissey* v. *Brewer*, 408 U. S. 471, 482 (1972). The same is true regarding the allegedly improved conditions of confinement—a proposition, incidentally, that is disputed by several *amici curiae*.[5] The fact that the present conditions may satisfy standards appropriate for incarcerated juvenile offenders does not detract in the slightest from the basic proposition that this is a case about the wholesale detention of children who do not pose a risk of flight, and who are not a threat to either themselves or the community.

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[2] See Tr. of Oral Arg. 55 (statement by counsel for petitioners).

[3] The Court assumes that the rule allows release to any "close relative," *ante,* at 302. The assumption is incorrect for two reasons: The close character of a family relationship is determined by much more than the degree of affinity; moreover, contrary to the traditional view expressed in *Moore* v. *East Cleveland,* 431 U. S. 494, 504 (1977), the INS rule excludes cousins.

[4] The difference is readily apparent even from the face of the allegedly benign Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, reprinted in App. to Pet. for Cert. 148a–205a (Juvenile Care Agreement), upon which the Court so heavily relies to sustain this regulation. To say that a juvenile care facility under the agreement is to be operated "'in an open type of setting without a need for *extraordinary* security measures,'" *ante,* at 298 (quoting Juvenile Care Agreement 173a) (emphasis added), suggests that the facility has some *standard* level of security designed to ensure that children do not

Second, the period of detention is indefinite, and has, on occasion, approached one year.[6] In its statement of policy

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leave. That notion is reinforced by the very next sentence in the agreement: "However, [r]ecipients are required to design programs and strategies to discourage runaways and prevent the unauthorized absence of minors in care." *Ibid.*

Indeed, the very definition of the word "detention" in the American Bar Association's Juvenile Justice Standards reflects the fact that it still constitutes detention even if a juvenile is placed in a facility that is "decent and humane," *ante*, at 303:

"The definition of detention in this standard includes every facility used by the state to house juveniles during the interim period. Whether it gives the appearance of the worst sort of jail, or a comfortable and pleasant home, the facility is classified as 'detention' if it is not the juvenile's usual place of abode." Institute of Judicial Administration, American Bar Association, Juvenile Justice Standards: Standards Relating to Interim Status 45 (1980) (citing Wald, "Pretrial Detention for Juveniles," in Pursuing Justice for the Child 119, 120 (Rosenheim ed. 1976)).

The point cannot be overemphasized. The legal formalism that children are always in someone else's custody should not obscure the fact that "[i]nstitutionalization," as JUSTICE O'CONNOR explains, "is a decisive and unusual event." *Ante*, at 318 (concurring opinion).

[5] See Brief for Southwest Refugee Rights Project et al. as *Amici Curiae* 20–33.

[6] See Deposition of Kim Carter Hedrick, INS Detention Center Director-Manager (CD Cal., June 27, 1986), p. 68.

governing proposed contracts with private institutions that may assume physical (though not legal) custody of these minors, the INS stated that the duration of the confinement "is anticipated to be approximately thirty (30) days; however, due to the variables and uncertainties inherent in each case, [r]ecipients must design programs which are able to provide a combination of short term and long term care." Juvenile Care Agreement 178a. The INS rule itself imposes no time limit on the period of detention. The only limit is the statutory right to seek a writ of habeas corpus on the basis of a "conclusive showing" that the Attorney General is not processing the deportation proceeding "with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case . . . ." 8 U. S. C. § 1252(a)(1). Because examples of protracted deportation proceedings are so common, the potential for a lengthy period of confinement is always present. The fact that an excessive delay may not "invariably ensue," *ante,* at 309, provides small comfort to the typical detainee.

I

The Court glosses over the history of this litigation, but that history speaks mountains about the bona fides of the Government's asserted justification for its regulation, and demonstrates the complete lack of support, in either evidence or experience, for the Government's contention that detaining alien juveniles when there are "other responsible parties" willing to assume care somehow protects the interests of these children.

The case was filed as a class action in response to a policy change adopted in 1984 by the Western Regional Office of the INS. Prior to that change, the relevant policy in the Western Region had conformed to the practice followed by the INS in the rest of the country, and also followed by federal magistrates throughout the country in the administration of § 504 of the Juvenile Justice and Delinquency Prevention Act of 1974. Consistently with the consensus expressed in a number of recommended standards for the treatment of juveniles,[7] that statute authorizes the release of a juvenile

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[7] See, *e. g.*, U. S. Dept. of Health, Education, and Welfare, Model Acts for Family Courts and State-Local Children's Programs 24 (1975) ("[W]ith all possible speed" the child should be released to "parents, guardian, custodian, or other suitable person able and willing to provide supervision and care"); U. S. Dept. of Justice, National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice 299 (1980) (a juvenile subject to the jurisdiction of the family court "should be placed in a foster home or shelter facility only when . . . there is no person willing and able to provide supervision and care"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections 267 (1973) ("Detention should be used only where the juvenile has no parent, guardian, custodian, or other person able to provide supervision and care"); Institute of Judicial Administration, American Bar Association, Standards Relating to Noncriminal Misbehavior 41, 42 (1982) ("If the juvenile consents," he should be released "to the parent, custodian, relative, or other responsible person as soon as practicable").

State law from across the country regarding the disposition of juveniles who come into state custody is consistent with these standards. See, *e. g.*, Ala. Code § 12–15–62 (1986) (allowing release to custody of "a parent, guardian, custodian or any other person who the court deems proper"); Conn. Gen. Stat. § 46b–133 (1986) (allowing release to "parent or parents, guardian or some other suitable person or agency"); D. C. Code Ann. § 16–2310 (1989) (allowing release to "parent, guardian, custodian, or other person or agency able to provide supervision and care for him"); Idaho Code § 16–1811.1(c) (Supp. 1992) (allowing release to custody of "parent or other responsible adult"); Iowa Code § 232.19(2) (1987) (release to "parent, guardian, custodian, responsible adult relative, or other adult approved by the court"); Ky. Rev. Stat. Ann. § 610.200 (Michie 1990) (release to custody of "relative, guardian, person exercising custodial control or supervision or other responsible person"); Me. Rev. Stat. Ann., Tit. 15, § 3203–A (Supp. 1992) (release to "legal custodian or other suitable person"); Md. Cts. & Jud. Proc. Code Ann. § 3–814(b)(1) (1989) (release to "parents, guardian, or custodian or to any other person designated by the court"); Mass. Gen. Laws § 119:67 (1969) (release to "parent, guardian or any other reputable person"); Minn. Stat. § 260.171 (1992) (release to "parent, guardian, custodian, or other suitable person"); Miss. Code Ann. § 43–21–301(4) (Supp. 1992) (release to "any person or agency"); Neb. Rev. Stat. § 43–253 (1988) (release to "parent, guardian, relative, or other responsible person");

charged with an offense "to his parents, guardian, custodian, or *other responsible party (including, but not limited to, the director of a shelter-care facility)* upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others." 18 U. S. C. § 5034 (emphasis added).[8] There is no evidence in the record of this litigation that any release by the INS, or by a federal magistrate, to an "other responsible party" ever resulted in any harm to a juvenile. Thus, nationwide experience prior to 1984 discloses no evidence of any demonstrated need for a change in INS policy.

Nevertheless, in 1984 the Western Region of the INS adopted a separate policy for minors in deportation proceedings, but not for exclusion proceedings. The policy provided that minors would be released only to a parent or lawful guardian, except " 'in unusual and extraordinary cases, at the

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Nev. Rev. Stat. § 62.170 (1991) (release to "parent or other responsible adult"); N. H. Rev. Stat. Ann. § 169–B:14 (1990) (release to relative, friend, foster home, group home, crisis home, or shelter-care facility); S. C. Code Ann. § 20–7–600 (Supp. 1992) (release to "parent, a responsible adult, a responsible agent of a court-approved foster home, group home, facility, or program"); S. D. Codified Laws § 26–7A–89 (1992) (release to probation officer or any other suitable person appointed by the court); Tex. Fam. Code Ann. § 52.02 (Supp. 1993) (release to "parent, guardian, custodian of the child, or other responsible adult"); Utah Code Ann. § 78–3a–29(3)(a) (1992) (release to "parent or other responsible adult").

[8] As enacted in 1938, the Federal Juvenile Delinquency Act authorized a committing magistrate to release a juvenile "upon his own recognizance or that of some responsible person. . . . Such juvenile shall not be committed to a jail or other similar institution, unless in the opinion of the marshal it appears that such commitment is necessary to secure the custody of the juvenile or to insure his safety or that of others." § 5, 52 Stat. 765. The "responsible person" alternative has been a part of our law ever since.

discretion of a District Director or Chief Patrol Agent.'" *Flores* v. *Messe*, 942 F. 2d 1352, 1355 (CA9 1991). The regional Commissioner explained that the policy was "'necessary to assure that the minor's welfare and safety is *[sic]* maintained and that the agency is protected against possible legal liability.'" *Flores* v. *Meese*, 934 F. 2d 991, 994 (CA9 1990), vacated, 942 F. 2d 1352 (CA9 1991) (en banc). As the Court of Appeals noted, the Commissioner "did not cite any instances of harm which had befallen children released to unrelated adults, nor did he make any reference to suits that had been filed against the INS arising out of allegedly improper releases." 942 F. 2d, at 1355.[9]

The complete absence of evidence of any need for the policy change is not the only reason for questioning the bona fides of the Commissioner's expressed interest in the welfare of alien minors as an explanation for his new policy. It is equally significant that at the time the new policy was adopted the conditions of confinement were admittedly "deplorable."[10] How a responsible administrator could possibly conclude that the practice of commingling harmless children with adults of the opposite sex[11] in detention centers protected by barbed-wire fences,[12] without providing them with education, recreation, or visitation,[13] while subjecting them to arbitrary strip searches,[14] would be in their best interests is most difficult to comprehend.

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[9] The court added: "It has remained undisputed throughout this proceeding that the blanket detention policy is not necessary to ensure the attendance of children at deportation hearings." 942 F. 2d, at 1355. Although the Commissioner's expressed concern about possible legal liability may well have been genuine, in view of the fact that the policy change occurred prior to our decision in *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189 (1989), the Court of Appeals was surely correct in observing that "governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from the constraints of governmental custody." 942 F. 2d, at 1363. Even if that were not true, the Agency's selfish interest in avoiding potential liability would be manifestly insufficient to justify its wholesale deprivation of a core liberty interest. In this Court, petitioners have prudently avoided any reliance on what may have been the true explanation for the genesis of this litigation.

[10] In response to respondents' argument in their brief in opposition to the petition for certiorari that the unsatisfactory character of the INS detention facilities justified the injunction entered by the District Court, the INS asserted that "these deplorable conditions were addressed and

The evidence relating to the period after 1984 only increases the doubt concerning the true motive for the policy adopted in the Western Region. First, as had been true before 1984, the absence of any indication of a need for such a policy in any other part of the country persisted. Moreover, there is evidence in the record that in the Western Region when undocumented parents came to claim their children, they were immediately arrested and deportation proceedings were instituted against them. 934 F. 2d, at 1023 (Fletcher, J., dissenting). Even if the detention of children might

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remedied during earlier proceedings in this case . . . ." Reply to Brief in Opposition 3. If the deplorable conditions prevailed when the litigation began, we must assume that the Western Regional Commissioner was familiar with them when he adopted his allegedly benevolent policy.

[11] See Deposition of Kim Carter Hedrick, *supra* n. 6, at 13.

[12] See Declaration of Paul DeMuro, Consultant, U. S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention (CD Cal., Apr. 11, 1987), p. 7. After inspecting a number of detention facilities, Mr. DeMuro declared:

"[I]t is clear as one approaches each facility that each facility is a locked, secure, detention facility. The Inglewood facility actually has two concentric perimeter fences in the part of the facility where children enter.

"The El Centro facility is a converted migrant farm workers' barracks which has been secured through the use of fences and barbed wire. The San Diego facility is the most jail-like. At this facility each barracks is secured through the use of fences, barbed wire, automatic locks, observation areas, etc. In addition the entire residential complex is secured through the use of a high security fence (16–18′), barbed wire, and supervised by uniformed guards." *Ibid.*

[13] See *id.*, at 8.

[14] See Defendants' Response to Requests for Admissions (CD Cal., Nov. 22, 1985), pp. 3–4.

serve a rational enforcement purpose that played a part in the original decisional process, that possibility can only add to the Government's burden of trying to establish its legitimacy.

After this litigation was commenced, the District Court enjoined the enforcement of the new policy because there was no rational basis for the disparate treatment of juveniles in deportation and exclusion proceedings. That injunction prompted the INS to promulgate the nationwide rule that is now at issue.[15] Significantly, however, in neither the rulemaking proceedings nor this litigation did the INS offer any evidence that compliance with that injunction caused any harm to juveniles or imposed any administrative burdens on the Agency.

The Agency's explanation for its new rule relied on four factual assertions. First, the rule "provides a single policy for juveniles in both deportation and exclusion proceedings." 53 Fed. Reg. 17449 (1988). It thus removed the basis for the outstanding injunction. Second, the INS had "witnessed a dramatic increase in the number of juvenile aliens it encounters," most of whom were "not accompanied by a parent, legal guardian, or other adult relative." *Ibid.* There is no mention, however, of either the actual or the approximate number of juveniles encountered, or the much smaller number that do not elect voluntary departure.[16] Third, the

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[15] The rule differs from the regional policy in three respects: (1) it applies to the entire country, rather than just the Western Region; (2) it applies to exclusion as well as deportation proceedings; and (3) it authorizes release to adult brothers, sisters, aunts, uncles, and grandparents as well as parents and legal guardians.

[16] In its brief in this Court petitioners' attempt to describe the magnitude of the problem addressed by the rule is based on material that is not in the record—an independent study of a sample of juveniles detained in Texas in 1989, see Brief for Petitioners 8, n. 12, and the Court in turn relies on the assertions made in the brief for petitioners about the problem in 1990. See *ante,* at 295. Since all of those figures relate to a period well after the rule was proposed in 1987 and promulgated in 1988, they obvi-

Agency stated that "concern for the welfare of the juvenile will not permit release to *just any adult.*" *Ibid.* (emphasis added).[17] There is no mention, however, of the obvious distinction between "just any adult" and the broad spectrum of responsible parties that can assume care of these children, such as extended family members, godparents, friends, and private charitable organizations. Fourth, "the Service has neither the expertise nor the resources to conduct home studies for placement of each juvenile released." *Ibid.* Again, however, there is no explanation of why any more elaborate or expensive "home study" would be necessary to evaluate the qualifications of apparently responsible persons than had been conducted in the past. There is a strange irony in both the fact that the INS suddenly decided that temporary releases that had been made routinely to responsible persons in the past now must be preceded by a "home study," and the fact that the scarcity of its "resources" provides the explanation for spending far more money on detention than would be necessary to perform its newly discovered home study obligation.[18]

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ously tell us nothing about the "dramatic increase" mentioned by the INS. 53 Fed. Reg. 17449 (1988). Indeed, the study cited by the Government also has nothing to say about any *increase* in the number of encounters with juvenile aliens. In all events, the fact that both the Government and this Court deem it appropriate to rely on a *post hoc,* nonrecord exposition of the dimensions of the problem that supposedly led to a dramatic change in INS policy merely highlights the casual character of the Agency's deliberative process. One can only speculate about whether the "dramatic increase in the number of juvenile aliens it encounters," *ibid.,* or the District Court's injunction was the more important cause of the new rule.

[17] This statement may be the source of the Court's similar comment that "the INS cannot simply send them off into the night on bond or recognizance." *Ante,* at 295. There is, of course, no evidence that the INS had ever followed such an irresponsible practice, or that there was any danger that it would do so in the future.

[18] The record indicates that the cost of detention may amount to as much as $100 per day per juvenile. Deposition of Robert J. Schmidt, Immigration and Naturalization Service (July 31, 1986), p. 76. Even the sort of

What the Agency failed to explain may be even more significant than what it did say. It made no comment at all on the uniform body of professional opinion that recognizes the harmful consequences of the detention of juveniles.[19] It made no comment on the period of detention that would be required for the completion of deportation proceedings, or the reasons why the rule places no limit on the duration of the detention. Moreover, there is no explanation for the absence of any specified procedure for either the consideration or the review of a request for release to an apparently responsible person.[20] It is difficult to understand why an

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elaborate home study that might be appropriate as a predicate to the adoption of a newborn baby should not cost as much as a few days of detention. Moreover, it is perfectly obvious that the qualifications of most responsible persons can readily be determined by a hearing officer, and that in any doubtful case release should be denied. The respondents have never argued that there is a duty to release juveniles to "just any adult." 53 Fed. Reg. 17449 (1988).

[19] Consistent with the standards developed by the American Bar Association and other organizations and agencies, see n. 7, *supra,* the United States Department of Justice's own Standards for the Administration of Juvenile Justice describe "the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a secure facility, and the corresponding need to assure as quickly as possible that such detention is necessary." U. S. Dept. of Justice, Standards for the Administration of Juvenile Justice, *supra* n. 7, at 304.

[20] As Judge Rymer pointed out in her separate opinion in the Court of Appeals: "Unlike the statutes at issue in *Schall* v. *Martin,* 467 U. S. 253 . . . (1984), and [*United States* v.] *Salerno,* [481 U. S. 739 (1987),] which survived due process challenges, the INS regulations provide no opportunity for the reasoned consideration of an alien juvenile's release to the custody of a non-relative by a neutral hearing officer. Nor is there any provision for a prompt hearing on a § 242.24(b)(4) release. No findings or reasons are required. Nothing in the regulations provides the unaccompanied detainee any help, whether from counsel, a parent or guardian, or anyone else. Similarly, the regulation makes no provision for appointing a guardian if no family member or legal guardian comes forward. There is no analogue to a pretrial services report, however cursory. While the INS argues that it lacks resources to conduct home studies, there is no substantial indication that some investigation or opportunity for independ-

agency purportedly motivated by the best interests of detained juveniles would have so little to say about obvious objections to its rule.

The promulgation of the nationwide rule did not, of course, put an end to the pending litigation. The District Court again enjoined its enforcement, this time on the ground that it deprived the members of the respondent class of their liberty without the due process of law required by the Fifth Amendment. For the period of over four years subsequent to the entry of that injunction, the INS presumably has continued to release juveniles to responsible persons in the Western Region without either performing any home studies or causing any harm to alien juveniles. If any evidence confirming the supposed need for the rule had developed in recent years, it is certain that petitioners would have called it to our attention, since the INS did not hesitate to provide us with off-the-record factual material on a less significant point. See n. 16, *supra.*

The fact that the rule appears to be an ill-considered response to an adverse court ruling, rather than the product of the kind of careful deliberation that should precede a policy change that has an undeniably important impact on individual liberty, is not, I suppose, a sufficient reason for concluding that it is invalid.[21] It does, however, shed light

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ent, albeit informal consideration of the juvenile's circumstances in relation to the adult's agreement to care for her is impractical or financially or administratively infeasible. Although not entirely clear where the burden of proof resides, it has not clearly been imposed on the government. And there is no limit on when the deportation hearing must be held, or put another way, how long the minor may be detained. In short, there is no ordered structure for resolving custodial status when no relative steps up to the plate but an unrelated adult is able and willing to do so." *Flores* v. *Meese,* 942 F. 2d, 1352, 1374–1375 (CA9 1991) (opinion concurring in judgment in part and dissenting in part) (footnotes omitted).

[21] That fact may, however, support a claim that the INS' issuance of the regulation was arbitrary and capricious within the meaning of the Administrative Procedure Act (APA), 5 U. S. C. § 706. See *Motor Vehicle*

on the question whether the INS has legitimately exercised the discretion that the relevant statute has granted to the Attorney General. In order to avoid the constitutional question, I believe we should first address that statutory issue. In the alternative, as I shall explain, I would hold that a rule providing for the wholesale detention of juveniles for an indeterminate period without individual hearings is unconstitutional.

II

Section 242(a) of the Immigration and Nationality Act provides that any "alien taken into custody may, in the discretion of the Attorney General and pending [a] final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole." 8 U. S. C. § 1252(a)(1). Despite the exceedingly broad language of § 242(a), the Court has recognized that "once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative." *United States* v. *Witkovich*, 353

Mfrs. Assn. of United States, Inc. v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). Respondents brought such a claim in the District Court, but do not renew that line of argument in this Court. In any event, even if the INS has managed to stay within the bounds of the APA, there is nonetheless a disturbing parallel between the Court's ready conclusion that no individualized hearing need precede the deprivation of liberty of an undocumented alien so long as the conditions of institutional custody are "good enough," *ante*, at 305, and similar *post hoc* justifications for discrimination that is more probably explained as nothing more than "the accidental byproduct of a traditional way of thinking about" the disfavored class, see *Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in judgment).

U. S. 194, 199 (1957). See also *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183 (1991) *(NCIR).*

Our cases interpreting § 242(a) suggest that two such "considerations" are paramount: indications of congressional policy, and the principle that "a restrictive meaning must be given if a broader meaning would generate constitutional doubts." *Witkovich,* 353 U. S., at 199. Thus, in *Carlson* v. *Landon,* 342 U. S. 524 (1952), we upheld the Attorney General's detention of deportable members of the Communist Party, relying heavily on the fact that Congress had enacted legislation, the Internal Security Act of 1950, based on its judgment that Communist subversion threatened the Nation. *Id.*, at 538. The Attorney General's discretionary decision to detain certain alien Communists was thus "wholly consistent with Congress' intent," *NCIR,* 502 U. S., at 194 (summarizing Court's analysis in *Carlson*). Just last Term, we faced the question whether the Attorney General acted within his authority in requiring that release bonds issued pursuant to § 242(a) contain a condition forbidding unauthorized employment pending determination of deportability. See *NCIR, supra.* Relying on related statutes and the "often recognized" principle that "a primary purpose in restricting immigration is to preserve jobs for American workers," *id.*, at 194, and n. 8 (internal quotation marks omitted), we held that the regulation was "wholly consistent with this established concern of immigration law and thus squarely within the scope of the Attorney General's statutory authority." *Ibid.* Finally, in *Witkovich,* the Court construed a provision of the Immigration and Nationality Act which made it a criminal offense for an alien subject to deportation to willfully fail to provide to the Attorney General " 'information . . . as to his nationality, circumstances, habits, associations, and activities, and such other information . . . as the Attorney General may deem fit and proper.' " 353 U. S., at 195. Noting that "issues touching liberties that the Constitution safeguards, even for an alien 'person,' would fairly be raised on the Government's [broad] view of the statute," we held that the statute merely authorized inquiries calculated to determine the continued availability for departure of aliens whose deportation was overdue. *Id.*, at 201–202.

The majority holds that it was within the Attorney General's authority to determine that parents, guardians, and certain relatives are "presumptively appropriate custodians" for the juveniles that come into the INS' custody, *ante*, at 310, and therefore to detain indefinitely those juveniles who are without one of the "approved" custodians.[22] In my view, however, the guiding principles articulated in *Carlson*, *NCIR*, and *Witkovich* compel the opposite conclusion.

Congress has spoken quite clearly on the question of the plight of juveniles that come into federal custody. As explained above, § 504 of the Juvenile Justice and Delinquency Prevention Act of 1974 demonstrates Congress' clear preference for release, as opposed to detention. See S. Rep. No.

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[22] While the regulation provides that release can be granted to a broader class of custodians in "unusual and compelling circumstances," the practice in the Western Region after the 1984 order, but before the issuance of the injunction, was to exercise that discretion only in the event of medical emergency. See Federal Defendants' Responses to Plaintiffs' Second Set of Interrogatories (CD Cal., Jan. 30, 1986), pp. 11–12. At oral argument, counsel for petitioners suggested that "extraordinary and compelling circumstances" might include the situation where a godfather has lived and cared for the child, has a kind of family relationship with the child, *and* is in the process of navigating the state bureaucracy in order to be appointed a guardian under state law. Tr. of Oral Arg. 54. Regardless of the precise contours of the exception to the INS' sweeping ban on discretion, it seems fair to conclude that it is meant to be extremely narrow.

There is nothing at all "puzzling," *ante*, at 312, n. 7, in respondents' objection to the INS' requirement that would-be custodians apply for and become guardians in order to assume temporary care of the juveniles in INS custody. Formal state guardianship proceedings, regardless of how appropriate they may be for determinations relating to *permanent* custody, would unnecessarily prolong the detention of these children. What *is* puzzling is that the Court acknowledges, see *ibid.*, but then ignores the fact that were these children in *state* custody, they would be released to "other responsible adults" as a matter of course. See n. 7, *supra*.

93–1011, p. 56 (1974) ("[Section 504] establishes a presumption for release of the juvenile").[23] And, most significantly for this case, it demonstrates that Congress has rejected the very presumption that the INS has made in this case; for under the Act juveniles are not to be detained when there is a "responsible party," 18 U. S. C. § 5034, willing and able to assume care for the child.[24] It is no retort that § 504 is directed at citizens, whereas the INS' regulation is directed at aliens, *ante,* at 305–306, 312–313, n. 8; Reply Brief for Petitioners 5, n. 4. As explained above, the INS justifies its policy as serving the best interests of the juveniles that come into its custody. In seeking to dismiss the force of the Juvenile Justice and Delinquency Act as a source of congressional policy, the INS is reduced to the absurdity of contending that Congress has authorized the Attorney General to treat allegedly illegal aliens *better* than American citizens. In my view, Congress has spoken on the detention of juveniles, and has rejected the very presumption upon which the INS relies.

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[23] As I have already noted, the 1938 Federal Juvenile Delinquency Act authorized the magistrate to release an arrested juvenile "upon his own recognizance or that of *some responsible person,*" § 5, 52 Stat. 765 (emphasis added). This language was retained in the 1948 Act, see 62 Stat. 858, and amended to its present form in 1974. The Senate Report on the 1974 bill stated that it "also amends the Federal Juvenile Delinquency Act, virtually unchanged for the past thirty-five years, to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes and court decisions." S. Rep. No. 93–1011, p. 19 (1974). Juveniles arrested by the INS are, of course, within the category of "juveniles who come under Federal jurisdiction."

[24] I find this evidence of congressional intent and congressional policy far more significant than the fact that Congress has made the unexceptional determination that state human service agencies should play a role in the permanent resettlement of refugee children, *ante,* at 313, n. 8 (citing 8 U. S. C. § 1522(d)(2)(B)), and orphans adopted abroad by United States citizens, *ante,* at 313, n. 8 (citing 8 U. S. C. § 1154(d)). This case is not about the *permanent* settlement of alien children, or the establishment or *permanent* legal custody over alien children. It is about the *temporary detention* of children that come into federal custody, which is precisely the focus of § 504 of the Juvenile Justice and Delinquency Prevention Act of 1974.

Furthermore, the Court is simply wrong in asserting that the INS' policy is rooted in the "universally accepted presumptio[n] as to the custodial competence of parents and close relatives," *ante,* at 313, n. 8. The flaw in the INS' policy is not that it prefers parents and close relatives over unrelated adults, but that it prefers government detention over release to responsible adults. It is that presumption—that detention is better or more appropriate for these children than release to unrelated responsible adults—that is contrary to congressional policy.

There is a deeper problem with the regulation, however, one that goes beyond the use of the *particular* presumption at issue in this case. Section 242(a) grants to the Attorney General the *discretion* to detain individuals pending deportation. As we explained in *Carlson*, a "purpose to injure [the United States] could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General to detain aliens without bail . . . ." 342 U. S., at 538. In my view, Congress has not authorized the INS to rely on mere presumptions as a substitute for the exercise of that discretion.

The Court's analysis in *Carlson* makes that point clear. If ever there were a factual predicate for a "reasonable presumptio[n]," *ante*, at 313, it was in that case, because Congress had expressly found that communism posed a "clear and present danger to the security of the United States," and that mere membership in the Communist Party was a sufficient basis for deportation.[25] Yet, in affirming the Attorney

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[25] The Internal Security Act of 1950 was based on explicit findings regarding the nature of the supposed threat posed by the worldwide Communist conspiracy. The Communist Party in the United States, Congress found, "'is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined . . . [a]waiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement . . . .'" 342 U. S., at 535, n. 21 (quoting § 2(15) of the Internal Security Act of 1950).

General's detention of four alien Communists, the Court was careful to note that the Attorney General had not merely relied on a presumption that alien Communists posed a risk to the United States, and that therefore they should be detained, but that the detention order was grounded in "evidence of membership *plus* personal activity in supporting and extending the Party's philosophy concerning violence," 342 U. S., at 541 (emphasis added). In fact, the Court expressly noted that "[t]here is no evidence or contention that all persons arrested as deportable under the . . . Internal Security Act for Communist membership are denied bail," and that bail is allowed "in the large majority of cases." *Id.*, at 541–542.

By the same reasoning, the Attorney General is not authorized, in my view, to rely on a presumption regarding the suitability of potential custodians as a substitute for determining whether there is, in fact, any reason that a *particular* juvenile should be detained. Just as a "purpose to injure could not be imputed generally to all aliens," *id.*, at 538, the unsuitability of certain unrelated adults cannot be imputed generally to all adults so as to lengthen the detention to which these children are subjected. The particular circumstances facing these juveniles are too diverse, and the right to be free from government detention too precious, to permit the INS to base the crucial determinations regarding detention upon a mere presumption regarding "appropriate custodians," *ante*, at 310. I do not believe that Congress intended to authorize such a policy.[26]

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[26] Neither *NCIR*, 502 U. S. 183 (1991), nor *Heckler* v. *Campbell*, 461 U. S. 458, 467 (1983), upon which the majority relies for the proposition that the INS can rely on "reasonable presumptions" and "generic rules," *ante*, at 313, are to the contrary. The Court mentioned the word "presumption" in a footnote in the *NCIR* case, 502 U. S., at 196, n. 11, merely in noting that the regulation at issue—a broad rule requiring that all release bonds contain a condition forbidding unauthorized employment—seemed to presume that undocumented aliens taken into INS custody were not, in fact, author-

And finally, even if it were not clear to me that the Attorney General has exceeded her authority under § 242(a), I would still hold that § 242(a) requires an individualized deter-

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ized to work. We said that such a *de facto* presumption was reasonable because the vast majority of aliens that come into INS custody do not have such authorization, and because the presumption was easily rebutted. *Ibid.* To the extent that case has any bearing on the INS' use of presumptions, it merely says that the INS may use some easily rebuttable presumptions in identifying the class of individuals subject to its regulations—in that case, aliens lacking authorization to work. Once that class is properly identified, however, the issue becomes whether the INS can use mere presumptions as a basis for making fundamental decisions about detention and freedom. On *that* question, *NCIR* is silent; for the regulation at issue there was not based on a presumption at all. It simply provided that an alien who violates American law by engaging in unauthorized employment also violates the terms of his release from INS custody. *Id.*, at 185.

Heckler v. *Campbell*, 461 U. S. 458 (1983), presents a closer analog to what the INS has done in this case, but only as a matter of logic, for the factual differences between the governmental action approved in *Heckler* and the INS' policy in this case renders the former a woefully inadequate precedent to support the latter. In *Heckler*, the Court approved the use of pre-established medical-vocational guidelines for determining Social Security disability benefits, stating:

"The Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration. A contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking." *Id.*, at 467 (citations omitted).

Suffice it to say that the determination as to the suitability of a temporary guardian for a juvenile, unlike the determination as to the nature and type of jobs available for an injured worker, *is* an inquiry that requires case-by-case consideration, and *is not* one that may be established fairly and efficiently in a single rulemaking. More importantly, the determination as to whether a child should be released to the custody of a friend, godparent, or cousin, as opposed to being detained in a government institution, implicates far more fundamental concerns than whether an individual will receive a particular government benefit. In my view, the Court's reliance on *Heckler* v. *Campbell* cuts that case from its administrative law mination as to whether detention is necessary when a juvenile does not have an INS-preferred custodian available to assume temporary custody. "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Witkovich,* 353 U. S., at 201–202 (quoting *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932)). The detention of juveniles on the basis of a general presumption as to the suitability of particular custodians without an individualized determination as to whether that presumption bears any relationship at all to the facts of a particular case implicates an interest at the very core of the Due Process Clause, the constitutionally protected interest in freedom from bodily restraint. As such, it raises even more serious constitutional concerns than the INS policy invalidated in *Witkovich.* Legislative grants of discretionary authority should be construed to avoid constitutional issues and harsh consequences that were almost certainly not contemplated or intended by Congress. Unlike my colleagues, I would hold that the Attorney General's actions in this case are not authorized by § 242(a).

III

I agree with JUSTICE O'CONNOR that respondents "have a constitutionally protected interest in freedom from institutional confinement . . . [that] lies within the core of the Due Process Clause." *Ante,* at 315 (concurring opinion). Indeed, we said as much just last Term. See *Foucha* v. *Louisiana,* 504 U. S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause from arbitrary governmental action"). *Ibid.*

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moorings. I simply do not believe that Congress authorized the INS to determine, by rulemaking, that children are better off in government detention facilities than in the care of responsible friends, cousins, godparents, or other responsible parties.

("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty") (quoting *United States* v. *Salerno,* 481 U. S. 739, 750 (1987)).

I am not as convinced as she, however, that "the Court today does not hold otherwise." *Ante,* at 315 (concurring opinion). For the children at issue in this case *are* being confined in government-operated or government-selected institutions, their liberty *has been* curtailed, and yet the Court defines the right at issue as merely the "alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." *Ante,* at 302. Finding such a claimed constitutional right to be "nove[l]," *ante,* at 303, and certainly not "fundamental," *ante,* at 305, 311, the Court concludes that these juveniles' alleged "right" to be released to "other responsible adults" is easily trumped by the government's interest in protecting the welfare of these children and, most significantly, by the INS' interest in avoiding the administrative inconvenience and expense of releasing them to a broader class of custodians. *Ante,* at 305, 311–312.

In my view, the only "novelty" in this case is the Court's analysis. The right at stake in this case is not the right of detained juveniles to be *released* to one particular custodian rather than another, but the right not to be *detained* in the first place. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno,* 481 U. S., at 755. It is the government's burden to prove that detention is necessary, not the individual's burden to prove that release is justified. And, as JUSTICE O'CONNOR explains, that burden is not easily met, for when government action infringes on this most fundamental of rights, we have scrutinized such conduct to ensure that the detention serves both "legitimate and compelling" interests, *id.*, at 749, and, in addition, is implemented in a manner that is "carefully limited" and "narrowly focused." *Foucha*, 504 U. S., at 81.[27]

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[27] A comparison of the detention regimes upheld in *Salerno* and struck down in *Foucha* is illustrative. In *Salerno*, we upheld against due process attack provisions of the Bail Reform Act of 1984 which allow a federal court to detain an arrestee before trial if the Government can demonstrate that no release conditions will "'reasonably assure . . . the safety of any other person and the community.'" *Salerno*, 481 U. S., at 741. As we explained in *Foucha:*

"The statute carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes . . . , and was narrowly focused on a particularly acute problem in which the government interests are overwhelming. In addition to first demonstrating probable cause, the Government was required, in a full-blown adversary hearing, to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person . . . . Furthermore, the duration of confinement under the Act was strictly limited. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the stringent limitations of the Speedy Trial Act." 504 U. S., at 81 (citations and internal quotation marks omitted).

By contrast, the detention statute we struck down in *Foucha* was anything but narrowly focused or carefully limited. Under Louisiana law, criminal defendants acquitted by reason of insanity were automatically committed to state psychiatric institutions, regardless of whether they were then insane, and held until they could prove that they were no longer dangerous. *Id.*, at 73. We struck down the law as a violation of the substantive component of the Due Process Clause of the Fourteenth Amendment:

"Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous . . . .

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"It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. Here, in contrast, On its face, the INS' regulation at issue in this case cannot withstand such scrutiny.[28] The United States no doubt has a substantial and legitimate interest in protecting the welfare of juveniles that come into its custody. *Schall* v. *Martin*, 467 U. S. 253, 266 (1984). However, a blanket rule that simply *presumes* that detention is more appropriate than release to responsible adults is not narrowly focused on serving that interest. Categorical distinctions between cousins and uncles, or between relatives and godparents or other responsible persons, are much too blunt instruments to justify wholesale deprivations of liberty. Due process demands more, far more.[29] If the Government is going to detain juveniles in order to protect their welfare, due process requires that it demonstrate, *on an individual basis*, that detention in fact serves that interest. That is the clear command of our cases. See, *e. g.*, *Foucha*, 504 U. S., at 81 (finding due process violation when individual who is detained on grounds

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the State asserts that . . . [Foucha] may be held indefinitely." *Id.*, at 81–82.

As explained in the text, the INS' regulation at issue in this case falls well on the *Foucha* side of the *Salerno/Foucha* divide.

[28] Because this is a facial challenge, the Court asserts that respondents cannot prevail unless there is "'no set of circumstances . . . under which the [regulation] would be valid.'" *Ante*, at 301. This is a rather puzzling pronouncement. Would a facial challenge to a statute providing for imprisonment of all alien children without a hearing fail simply because there is a set of circumstances in which at least one such alien should be detained? Is the Court saying that this challenge fails because the categorical deprivation of liberty to the members of the respondent class may turn out to be beneficial to some? Whatever the Court's rhetoric may signify, it seems clear to me, as I explain in the text, that detention for an insufficient reason without adequate procedural safeguards is a deprivation of liberty without due process of law.

[29] In objecting to this statement, see *ante*, at 311, n. 6, the majority once again mischaracterizes the issue presented in this case. As explained above, see n. 24, *supra*, the INS can of course favor release of a juvenile to a parent or close relative over release to an unrelated adult. What the INS cannot do, in my view, is prefer *detention* over *release* to a responsible adult, a proposition that hardly "revolutionize[s]" our family law.

of "dangerousness" is denied right to adversary hearing in "which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"); *Salerno,* 481 U. S., at 742 (finding no due process violation when detention follows hearing to determine whether detention is necessary to prevent flight or danger to community); *Schall* v. *Martin,* 467 U. S., at 263 (same; hearing to determine whether there is "serious risk" that if released juvenile will commit a crime); *Gerstein* v. *Pugh,* 420 U. S. 103, 126 (1975) (holding that Fourth Amendment requires judicial determination of probable cause as prerequisite to detention); *Greenwood* v. *United States,* 350 U. S. 366, 367 (1956) (upholding statute in which individuals charged with or convicted of federal crimes may be committed to the custody of the Attorney General after judicial determination of incompetency); *Carlson* v. *Landon,* 342 U. S., at 541 (approving Attorney General's discretionary decision to detain four alien Communists based on their membership and activity in Communist Party); *Ludecke* v. *Watkins,* 335 U. S. 160, 163, n. 5 (1948) (upholding Attorney General's detention and deportation of alien under the Alien Enemy Act; finding of "dangerousness" based on evidence adduced at administrative hearings). See also *Stanley* v. *Illinois,* 405 U. S. 645, 657–658 (1972) (State cannot rely on presumption of unsuitability of unwed fathers; State must make individualized determinations of parental fitness); *Carrington* v. *Rash,* 380 U. S. 89, 95–96 (1965) (striking down blanket exclusion depriving all servicemen stationed in State of right to vote when interest in limiting franchise to bona fide residents could have been achieved by assessing a serviceman's claim to residency on an individual basis).[30]

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[30] There is, of course, one notable exception to this long line of cases: *Korematsu* v. *United States,* 323 U. S. 214 (1944), in which the Court upheld the exclusion from particular "military areas" of all persons of Japanese ancestry without a determination as to whether any particular individual actually posed a threat of sabotage or espionage. *Id.,* at 215–

If, in fact, the Due Process Clause establishes a powerful presumption against unnecessary official detention that is not based on an individualized evaluation of its justification, why has the INS refused to make such determinations? As emphasized above, the argument that detention is more appropriate for these children than release to responsible adults is utterly lacking in support, in either the history of this litigation, or expert opinion. Presumably because of the improbability of the INS' asserted justification for its policy, the Court does not rely on it as the basis for upholding the regulation. Instead, the Court holds that even if detention is not really *better* for these juveniles than release to responsible adults, so long as it is "good enough," *ante*, at 305, the INS need not spend the time and money that would be necessary to actually serve the "best interests" of these children. *Ante*, at 304–305. In other words, so long as its cages are gilded, the INS need not expend its administrative resources on a program that would better serve its asserted interests and that would not need to employ cages at all.

The linchpin in the Court's analysis, of course, is its narrow reading of the right at stake in this case. By characterizing it as some insubstantial and nonfundamental right to be re-

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216. The Court today does not cite that case, but the Court's holding in *Korematsu* obviously supports the majority's analysis, for the Court approved a serious infringement of individual liberty without requiring a case-by-case determination as to whether such an infringement was in fact necessary to effect the Government's compelling interest in national security. I understand the majority's reluctance to rely on *Korematsu*. The exigencies of war that were thought to justify that categorical deprivation of liberty are not, of course, implicated in this case. More importantly, the recent congressional decision to pay reparations to the Japanese-Americans who were detained during that period, see Restitution for World War II Internment of Japanese Americans and Aleuts, 102 Stat. 903, suggests that the Court should proceed with extreme caution when asked to permit the detention of juveniles when the Government has failed to inquire whether, in any given case, detention actually serves the Government's interest in protecting the interests of the children in its custody.

leased to an unrelated adult, the Court is able to escape the clear holding of our cases that "administrative convenience" is a thoroughly inadequate basis for the deprivation of core constitutional rights. *Ante,* at 311 (citing, for comparison, *Stanley* v. *Illinois,* 405 U. S. 645 (1972)). As explained above, however, the right at issue in this case is not the right to be released to an unrelated adult; it is the right to be free from Government confinement that is the very essence of the liberty protected by the Due Process Clause. It is a right that cannot be defeated by a claim of a lack of expertise or a lack of resources. In my view, then, *Stanley* v. *Illinois* is not a case to look to for comparison, but one from which to derive controlling law. For in *Stanley,* we flatly rejected the premise underlying the Court's holding today.

In that case, we entertained a due process challenge to a statute under which children of unwed parents, upon the death of the mother, were declared wards of the State without any hearing as to the father's fitness for custody. In striking down the statute, we rejected the argument that a State's interest in conserving administrative resources was a sufficient basis for refusing to hold a hearing as to a father's fitness to care for his children:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.
>
> "*Bell* v. *Burson*[, 402 U. S. 535 (1971),] held that the State could not, while purporting to be concerned with fault in suspending a driver's license, deprive a citizen of his license without a hearing that would assess fault. Absent fault, the State's declared interest was so attenuated that administrative convenience was insufficient to excuse a hearing where evidence of fault could be con-

> sidered. That drivers involved in accidents, as a statistical matter, might be very likely to have been wholly or partially at fault did not foreclose hearing and proof on specific cases before licenses were suspended.
>
> "We think the Due Process Clause mandates a similar result here. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.*, at 656–658.

Just as the State of Illinois could not rely on the administrative convenience derived from denying fathers a hearing, the INS may not rely on the fact that "other concerns . . . compete for public funds and administrative attention," *ante*, at 305, as an excuse to keep from doing what due process commands: determining, on an individual basis, whether the detention of a child in a government-operated or government-sponsored institution actually serves the INS' asserted interest in protecting the welfare of that child.[31]

Ultimately, the Court is simply wrong when it asserts that "freedom from physical restraint" is not at issue in this case. That is precisely what is at issue. The Court's assumption that the detention facilities used by the INS conform to the standards set forth in the partial settlement in this case has nothing to do with the fact that the juveniles who are not released to relatives or responsible adults are held in detention facilities. They do not have the "freedom from physical restraint" that those who are released do have. That is what this case is all about. That is why the respondent class continues to litigate. These juveniles do not want to be committed to institutions that the INS and the Court believe are "good enough" for aliens simply because they conform to standards that are adequate for the incarceration of juvenile delinquents. They want the same kind of liberty that the Constitution guarantees similarly situated citizens. And as I read our precedents, the omission of any provision for individualized consideration of the best interests of the juvenile in a rule authorizing an indefinite period of detention of presumptively innocent and harmless children denies them precisely that liberty.

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[31] Of course, even as a factual matter the INS' reliance on its asserted inability to conduct home studies because of a lack of resources or expertise as a justification for its wholesale detention policy is unpersuasive. It is perfectly clear that the costs of detention far exceed the cost of the kinds of inquiry that are necessary or appropriate for temporary release determinations. See n. 18, *supra*. Moreover, it is nothing less than perverse that the Attorney General releases juvenile *citizens* to the custody of "other responsible adults" without the elaborate "home studies" allegedly necessary to safeguard the juvenile's interests but deems such studies necessary before releasing *noncitizens* to the custody of "other responsible adults."

I respectfully dissent.

SAUDI ARABIA ET AL. *v.* NELSON ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91–522. Argued November 30, 1992—Decided March 23, 1993

The respondents Nelson, a married couple, filed this action for damages against petitioners, the Kingdom of Saudi Arabia, a Saudi hospital, and the hospital's purchasing agent in the United States. They alleged, among other things, that respondent husband suffered personal injuries as a result of the Saudi Government's unlawful detention and torture of him and petitioners' negligent failure to warn him of the possibility of severe retaliatory action if he attempted to report on-the-job hazards. The Nelsons asserted jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1605(a)(2), which confers jurisdiction where an action is "based upon a commercial activity carried on in the United States by the foreign state." The District Court dismissed for lack of subject-matter jurisdiction. The Court of Appeals reversed, concluding that respondent husband's recruitment and hiring were "commercial activities" upon which the Nelsons' action was "based" for purposes of § 1605(a)(2).

Held: The Nelsons' action is not "based upon a commercial activity" within the meaning of the first clause of § 1605(a)(2), and the Act therefore confers no jurisdiction over their suit. Pp. 355–363.

(a) This action is not "based upon" a commercial activity. Although the Act does not define "based upon," the phrase is most naturally read to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case, and the statutory context confirms that the phrase requires something more than a mere connection with, or relation to, commercial activity. Even taking the Nelsons' allegations about respondent husband's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case. While these arguably commercial activities may have led to the commission of the torts that allegedly injured the Nelsons, it is only those torts upon which their action is "based" for purposes of the Act. Pp. 355–358.

(b) Petitioners' tortious conduct fails to qualify as "commercial activity" within the meaning of the Act. This Court has ruled that the Act largely codifies the so-called "restrictive" theory of foreign sovereign immunity, *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 612, and that a state engages in commercial activity under that theory where it exercises only those powers that can also be exercised by private citizens, rather than those powers peculiar to sovereigns, *id.*, at 614. The intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) boils down to abuse of the power of the police. However monstrous such abuse undoubtedly may be, a foreign state's exercise of that power has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. The Nelsons' argument that respondent husband's mistreatment constituted retaliation for his reporting of safety violations, and was therefore commercial in character, does not alter the fact that the powers allegedly abused were those of police and penal officers. In any event, that argument goes to the purpose of petitioners' conduct, which the Act explicitly renders irrelevant to the determination of an activity's commercial character. Pp. 358–363.

(c) The Nelsons' attempt to claim failure to warn is merely a semantic ploy. A plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity. Cf. *United States* v. *Shearer,* 473 U. S. 52, 54–55 (opinion of Burger, C. J.). P. 363.

923 F. 2d 1528, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined, and in which KENNEDY, J., joined except for the last paragraph of Part II. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined, *post,* p. 364. KENNEDY, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN and STEVENS, JJ., joined as to Parts I–B and II, *post,* p. 370. BLACKMUN, J., filed an opinion concurring in the judgment in part and dissenting in part, *post,* p. 376. STEVENS, J., filed a dissenting opinion, *post,* p. 377.

Everett C. Johnson, Jr., argued the cause for petitioners. With him on the briefs were *Mark E. Newell* and *Marc Cooper.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Douglas Letter,* and *Edwin D. Williamson.*

Paul Schott Stevens argued the cause for respondents. With him on the brief were *Leonard Garment, Abraham D. Sofaer, William R. Stein,* and *Anthony D'Amato.**

JUSTICE SOUTER delivered the opinion of the Court.

The Foreign Sovereign Immunities Act of 1976 entitles foreign states to immunity from the jurisdiction of courts in the United States, 28 U. S. C. § 1604, subject to certain enumerated exceptions. § 1605. One is that a foreign state shall not be immune in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." § 1605(a)(2). We hold that respondents' action alleging personal injury resulting from unlawful detention and torture by the Saudi Government is not "based upon a commercial activity" within the meaning of the Act, which consequently confers no jurisdiction over respondents' suit.

I

Because this case comes to us on a motion to dismiss the complaint, we assume that we have truthful factual allegations before us, see *United States* v. *Gaubert,* 499 U. S. 315, 327 (1991), though many of those allegations are subject to dispute, see Brief for Petitioners 3, n. 3; see also n. 1, *infra.* Petitioner Kingdom of Saudi Arabia owns and operates petitioner King Faisal Specialist Hospital in Riyadh, as well as petitioner Royspec Purchasing Services, the hospital's corporate purchasing agent in the United States. App. 91. The Hospital Corporation of America, Ltd. (HCA), an independent corporation existing under the laws of the Cayman Islands, recruits Americans for employment at the hospital under an agreement signed with Saudi Arabia in 1973. *Id.*, at 73.

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*Briefs of *amici curiae* urging affirmance were filed for Human Rights Watch by *Ellen Lutz, Kenneth Roth,* and *Jeffrey L. Braun;* and for the International Human Rights Law Group et al. by *Douglas G. Robinson, Julia E. Sullivan, Andrew L. Sandler, Michael Ratner, Steven M. Schneebaum, Janelle M. Diller,* and *Harold Koh.*

In its recruitment effort, HCA placed an advertisement in a trade periodical seeking applications for a position as a monitoring systems engineer at the hospital. The advertisement drew the attention of respondent Scott Nelson in September 1983, while Nelson was in the United States. After interviewing for the position in Saudi Arabia, Nelson returned to the United States, where he signed an employment contract with the hospital, *id.*, at 4, satisfied personnel processing requirements, and attended an orientation session that HCA conducted for hospital employees. In the course of that program, HCA identified Royspec as the point of contact in the United States for family members who might wish to reach Nelson in an emergency. *Id.*, at 33.

In December 1983, Nelson went to Saudi Arabia and began work at the hospital, monitoring all "facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others." *Id.*, at 4. He did his job without significant incident until March 1984, when he discovered safety defects in the hospital's oxygen and nitrous oxide lines that posed fire hazards and otherwise endangered patients' lives. *Id.*, at 57–58. Over a period of several months, Nelson repeatedly advised hospital officials of the safety defects and reported the defects to a Saudi Government commission as well. *Id.*, at 4–5. Hospital officials instructed Nelson to ignore the problems. *Id.*, at 58.

The hospital's response to Nelson's reports changed, however, on September 27, 1984, when certain hospital employees summoned him to the hospital's security office where agents of the Saudi Government arrested him.[1] The agents transported Nelson to a jail cell, in which they "shackled, tortured and bea[t]" him, *id.*, at 5, and kept him four days without food, *id.*, at 59. Although Nelson did not understand Arabic, government agents forced him to sign a statement written in that language, the content of which he did not know; a hospital employee who was supposed to act as Nelson's interpreter advised him to sign "anything" the agents gave him to avoid further beatings. *Ibid.* Two days later, government agents transferred Nelson to the Al Sijan Prison "to await trial on unknown charges." *Ibid.*

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[1] Petitioners assert that the Saudi Government arrested Nelson because he had falsely represented to the hospital that he had received a degree from the Massachusetts Institute of Technology and had provided the hospital with a forged diploma to verify his claim. Brief for Petitioners 4–5. The Nelsons concede these misrepresentations, but dispute that they occasioned Scott Nelson's arrest. Brief for Respondents 9.

At the prison, Nelson was confined in an overcrowded cell area infested with rats, where he had to fight other prisoners for food and from which he was taken only once a week for fresh air and exercise. *Ibid.* Although police interrogators repeatedly questioned him in Arabic, Nelson did not learn the nature of the charges, if any, against him. *Id.*, at 5. For several days, the Saudi Government failed to advise Nelson's family of his whereabouts, though a Saudi official eventually told Nelson's wife, respondent Vivian Nelson, that he could arrange for her husband's release if she provided sexual favors. *Ibid.*

Although officials from the United States Embassy visited Nelson twice during his detention, they concluded that his allegations of Saudi mistreatment were "not credible" and made no protest to Saudi authorities. *Id.*, at 64. It was only at the personal request of a United States Senator that the Saudi Government released Nelson, 39 days after his arrest, on November 5, 1984. *Id.*, at 60. Seven days later, after failing to convince him to return to work at the hospital, the Saudi Government allowed Nelson to leave the country. *Id.*, at 60–61.

In 1988, Nelson and his wife filed this action against petitioners in the United States District Court for the Southern District of Florida seeking damages for personal injury. The Nelsons' complaint sets out 16 causes of action, which fall into three categories. Counts II through VII and counts X, XI, XIV, and XV allege that petitioners committed various intentional torts, including battery, unlawful detainment, wrongful arrest and imprisonment, false imprisonment, inhuman torture, disruption of normal family life, and infliction of mental anguish. *Id.*, at 6–11, 15, 19–20. Counts I, IX, and XIII charge petitioners with negligently failing to warn Nelson of otherwise undisclosed dangers of his employment, namely, that if he attempted to report safety hazards the hospital would likely retaliate against him and the Saudi Government might detain and physically abuse him without legal cause. *Id.*, at 5–6, 14, 18–19. Finally, counts VIII, XII, and XVI allege that Vivian Nelson sustained derivative injury resulting from petitioners' actions. *Id.*, at 11–12, 16, 20. Presumably because the employment contract provided that Saudi courts would have exclusive jurisdiction over claims for breach of contract, *id.*, at 47, the Nelsons raised no such matters.

The District Court dismissed for lack of subject-matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §§ 1330, 1602 *et seq.* It rejected the Nelsons' argument that jurisdiction existed, under the first clause of § 1605(a)(2), because the action was one "based upon a commercial activity" that petitioners had "carried on in the United States." Although HCA's recruitment of Nelson in the United States might properly be attributed to Saudi Arabia and the hospital, the District Court reasoned, it did not amount to commercial activity "carried on in the United States" for purposes of the Act. *Id.*, at 94–95. The court explained that there was no sufficient "nexus" between Nelson's recruitment and the injuries alleged. "Although [the Nelsons] argu[e] that but for [Scott Nelson's] recruitment in the United States, he would not have taken the job, been arrested, and suffered the personal injuries," the court said, "this 'connection' [is] far too tenuous to support jurisdiction" under the Act. *Id.*, at 97. Likewise, the court concluded that Royspec's commercial activity in the United States, purchasing supplies and equipment for the hospital, *id.*, at

93–94, had no nexus with the personal injuries alleged in the complaint; Royspec had simply provided a way for Nelson's family to reach him in an emergency, *id.*, at 96.

The Court of Appeals reversed. 923 F. 2d 1528 (CA11 1991). It concluded that Nelson's recruitment and hiring were commercial activities of Saudi Arabia and the hospital, carried on in the United States for purposes of the Act, *id.*, at 1533, and that the Nelsons' action was "based upon" these activities within the meaning of the statute, *id.*, at 1533–1536. There was, the court reasoned, a sufficient nexus between those commercial activities and the wrongful acts that had allegedly injured the Nelsons: "the detention and torture of Nelson are so intertwined with his employment at the Hospital," the court explained, "that they are 'based upon' his recruitment and hiring" in the United States. *Id.*, at 1535. The court also found jurisdiction to hear the claims against Royspec. *Id.*, at 1536.[2] After the Court of Appeals denied petitioners' suggestion for rehearing en banc, App. 133, we granted certiorari, 504 U. S. 972 (1992). We now reverse.

II

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 443 (1989). Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 488–489 (1983); see 28 U. S. C. § 1604; J. Dellapenna, Suing Foreign Governments and Their Corporations 11, and n. 64 (1988).

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[2] The Court of Appeals expressly declined to address the act of state doctrine, 923 F. 2d, at 1536, and we do not consider that doctrine here.

Only one such exception is said to apply here. The first clause of § 1605(a)(2) of the Act provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state."[3] The Act defines such activity as "commercial activity carried on by such state and having substantial contact with the United States," § 1603(e), and provides that a commercial activity may be "either a regular course of commercial conduct or a particular commercial transaction or act," the "commercial character of [which] shall be determined by reference to" its "nature," rather than its "purpose," § 1603(d).

There is no dispute here that Saudi Arabia, the hospital, and Royspec all qualify as "foreign state[s]" within the meaning of the Act. Brief for Respondents 3; see 28 U. S. C. §§ 1603(a), (b) (term " 'foreign state' " includes " 'an agency or instrumentality of a foreign state' "). For there to be jurisdiction in this case, therefore, the Nelsons' action must be "based upon" some "commercial activity" by petitioners that had "substantial contact" with the United States within the meaning of the Act. Because we conclude that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact with the United States.

We begin our analysis by identifying the particular conduct on which the Nelsons' action is "based" for purposes of the Act. See *Texas Trading & Milling Corp.* v. *Federal*

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[3] In full, § 1605(a)(2) provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

Republic of Nigeria, 647 F. 2d 300, 308 (CA2 1981), cert. denied, 454 U. S. 1148 (1982); Donoghue, Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception, 17 Yale J. Int'l L. 489, 500 (1992). Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, see Black's Law Dictionary 151 (6th ed. 1990) (defining "base"); Random House Dictionary 172 (2d ed. 1987) (same); Webster's Third New International Dictionary 180, 181 (1976) (defining "base" and "based"), the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. See *Callejo* v. *Bancomer, S. A.,* 764 F. 2d 1101, 1109 (CA5 1985) (focus should be on the "gravamen of the complaint"); accord, *Santos* v. *Compagnie Nationale Air France,* 934 F. 2d 890, 893 (CA7 1991) ("An action is based upon the elements that prove the claim, no more and no less"); *Millen Industries, Inc.* v. *Coordination Council for North American Affairs,* 272 U. S. App. D. C. 240, 246, 855 F. 2d 879, 885 (1988).

What the natural meaning of the phrase "based upon" suggests, the context confirms. Earlier, see n. 3, *supra,* we noted that § 1605(a)(2) contains two clauses following the one at issue here. The second allows for jurisdiction where a suit "is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," and the third speaks in like terms, allowing for jurisdiction where an action "is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Distinctions among descriptions juxtaposed against each other are naturally understood to be significant, see *Melkonyan* v. *Sulli-*

van, 501 U. S. 89, 94–95 (1991), and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.[4]

In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him. While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case. The Nelsons have not, after all, alleged breach of contract, see *supra,* at 354, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.

Petitioners' tortious conduct itself fails to qualify as "commercial activity" within the meaning of the Act, although the Act is too "'obtuse'" to be of much help in reaching that conclusion. *Callejo, supra,* at 1107 (citation omitted). We have seen already that the Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U. S. C. § 1603(d). If this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term 'commercial' largely undefined." *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607, 612 (1992); see Donoghue, *supra*, at 499; Lowenfeld, Litigating a Sovereign Immunity Claim—The *Haiti* Case, 49 N. Y. U. L. Rev. 377, 435, n. 244 (1974) (commenting on then-draft Act) ("Start with 'activity,' proceed via 'conduct' or 'transaction' to 'character,' then refer to 'nature,' and then go back to 'commercial,' the term you started out to define in the first place"); G. Born & D. Westin, International Civil Litigation in United States Courts 479–480 (2d ed. 1992). We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act.

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[4] We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements. We do conclude, however, that where a claim rests entirely upon activities sovereign in character, as here, see *infra,* at 361–363, jurisdiction will not exist under that clause regardless of any connection the sovereign acts may have with commercial activity.

We took up the task just last Term in *Weltover, supra,* which involved Argentina's unilateral refinancing of bonds it had issued under a plan to stabilize its currency. Bondholders sued Argentina in federal court, asserting jurisdiction under the third clause of § 1605(a)(2). In the course of holding the refinancing to be a commercial activity for purposes of the Act, we observed that the statute "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952." 504 U. S., at 612. We accordingly held that the meaning of "commercial" for purposes of the Act must be the meaning Congress understood the restrictive theory to require at the time it passed the statute. See *id.*, at 612–613.

Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts *(jure imperii)*, but not as to those that are private or commercial in character *(jure gestionis)*. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S., at 487; *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U. S. 682, 698 (1976) (plurality opinion); see 28 U. S. C. § 1602; see also *Dunhill*, *supra*, at 711 (Appendix 2 to the opinion of the Court) (Letter to the Attorney General from Jack B. Tate, Acting Legal Adviser, Dept. of State, May 19, 1952); Hill, A Policy Analysis of the American Law of Foreign State Immunity, 50 Ford. L. Rev. 155, 168 (1981). We explained in *Weltover*, *supra*, at 614 (quoting *Dunhill*, *supra*, at 704), that a state engages in commercial activity under the restrictive theory where it exercises " 'only those powers that can also be exercised by private citizens,' " as distinct from those " 'powers peculiar to sovereigns.' " Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts "in the manner of a private player within" the market. 504 U. S., at 614; see Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987) ("Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons").

We emphasized in *Weltover* that whether a state acts "in the manner of" a private party is a question of behavior, not motivation:

> "[B]ecause the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever

> the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover, supra,* at 614 (citations omitted) (emphasis in original).

We did not ignore the difficulty of distinguishing "'purpose' (*i. e.,* the *reason* why the foreign state engages in the activity) from 'nature' (*i. e.,* the outward form of the conduct that the foreign state performs or agrees to perform)," but recognized that the Act "unmistakably commands" us to observe the distinction. 504 U. S., at 617 (emphasis in original). Because Argentina had merely dealt in the bond market in the manner of a private player, we held, its refinancing of the bonds qualified as a commercial activity for purposes of the Act despite the apparent governmental motivation. *Ibid.*

Unlike Argentina's activities that we considered in *Weltover,* the intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. See *Arango* v. *Guzman Travel Advisors Corp.,* 621 F. 2d 1371, 1379 (CA5 1980); *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes,* 336 F. 2d 354, 360 (CA2 1964) (restrictive theory does extend immunity to a foreign state's "internal administrative acts"), cert. denied, 381 U. S. 934 (1965); *Herbage* v. *Meese,* 747 F. Supp. 60, 67 (DC 1990), affirmance order, 292 U. S. App. D. C. 84, 946 F. 2d 1564 (1991); K. Randall, Federal Courts and the International Human Rights Paradigm 93 (1990) (the Act's commercial-activity exception is irrelevant to cases alleging that a foreign state has violated human rights).[5] Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y. B. Int'l L. 220, 225 (1952); see also *id.*, at 237.

The Nelsons and their *amici* urge us to give significance to their assertion that the Saudi Government subjected Nelson to the abuse alleged as retaliation for his persistence in reporting hospital safety violations, and argue that the character of the mistreatment was consequently commercial. One *amicus*, indeed, goes so far as to suggest that the Saudi Government "often uses detention and torture to resolve commercial disputes." Brief for Human Rights Watch as

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[5] The State Department's practice prior to the passage of the Act supports this understanding. Prior to the Act's passage, the State Department would determine in the first instance whether a foreign state was entitled to immunity and make an appropriate recommendation to the courts. See *Verlinden B. V.* v. *Central Bank of Nigeria,* 461 U. S. 480, 486–488 (1983). A compilation of available materials demonstrates that the Department recognized immunity with respect to claims involving the exercise of the power of the police or military of a foreign state. See Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau eds.), in 1977 Digest of United States Practice in International Law 1017, 1045–1046 (claim that Cuban armed guard seized cash from plaintiff at Havana airport); *id.,* at 1053–1054 (claim that Saudi militia fired on plaintiffs and caused personal and property damage).

JUSTICE WHITE points to an episode in which the State Department declined to recognize immunity with respect to a claim by Jamaican nationals, working in the United States, against the British West Indies Central Labour Organization, a foreign governmental agency. See *id.,* at 1062–1063; *post,* at 367–368, n. 3. In our view that episode bears little relation to this case, for the Jamaican nationals did not allege mistreatment by the police of a foreign state.

Amicus Curiae 6. But this argument does not alter the fact that the powers allegedly abused were those of police and penal officers. In any event, the argument is off the point, for it goes to purpose, the very fact the Act renders irrelevant to the question of an activity's commercial character. Whatever may have been the Saudi Government's motivation for its allegedly abusive treatment of Nelson, it remains the case that the Nelsons' action is based upon a sovereign activity immune from the subject-matter jurisdiction of United States courts under the Act.

In addition to the intentionally tortious conduct, the Nelsons claim a separate basis for recovery in petitioners' failure to warn Scott Nelson of the hidden dangers associated with his employment. The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. See *supra,* at 354. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity. Cf. *United States* v. *Shearer,* 473 U. S. 52, 54–55 (1985) (opinion of Burger, C. J.).

III

The Nelsons' action is not "based upon a commercial activity" within the meaning of the first clause of § 1605(a)(2) of the Act, and the judgment of the Court of Appeals is accordingly reversed.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

According to respondents' complaint, Scott Nelson's employer retaliated against him for reporting safety problems by "summon[ing him] . . . to the hospital's security office from which he was transported to a jail cell." App. 5. Once there, he allegedly was "shackled, tortured and beaten by persons acting at the direction, instigation, provocation, instruction or request of" petitioners—Saudi Arabia, King Faisal Specialist Hospital, and Royspec. *Id.*, at 5, 14, 18. The majority concludes that petitioners enjoy sovereign immunity because respondents' action is not "based upon a commercial activity." I disagree. I nonetheless concur in the judgment because in my view the commercial conduct upon which respondents base their complaint was not "carried on in the United States."

I

A

As the majority notes, the first step in the analysis is to identify the conduct on which the action is based. Respondents have pointed to two distinct possibilities. The first, seemingly pressed at trial and on appeal, consists of the recruiting and hiring activity in the United States. See Brief for Appellant in No. 89–5981 (CA11), pp. 12–15. Although this conduct would undoubtedly qualify as "commercial," I agree with the majority that it is "not the basis for the Nelsons' suit," *ante*, at 358, for it is unrelated to the elements of respondents' complaint.

In a partial change of course, respondents suggest to this Court both in their brief and at oral argument that we focus on the hospital's commercial activity in Saudi Arabia, its employment practices and disciplinary procedures. Under this view, the Court would then work its way back to the recruiting and hiring activity in order to establish that the commercial conduct in fact had "substantial contact" with the United

States. See Brief for Respondents 22, 24–25, 31; Tr. of Oral Arg. 44–45. The majority never reaches this second stage, finding instead that petitioners' conduct is not commercial because it "is not the sort of action by which private parties can engage in commerce." *Ante*, at 362. If by that the majority means that it is not the manner in which private parties *ought* to engage in commerce, I wholeheartedly agree. That, however, is not the relevant inquiry. Rather, the question we must ask is whether it is the manner in which private parties at times *do* engage in commerce.

B

To run and operate a hospital, even a public hospital, is to engage in a commercial enterprise. The majority never concedes this point, but it does not deny it either, and to my mind the matter is self-evident. By the same token, warning an employee when he blows the whistle and taking retaliatory action, such as harassment, involuntary transfer, discharge, or other tortious behavior, although not prototypical commercial acts, are certainly well within the bounds of commercial activity. The House and Senate Reports accompanying the legislation virtually compel this conclusion, explaining as they do that "a foreign government's . . . employment or engagement of laborers, clerical staff or marketing agents . . . would be among those included within" the definition of commercial activity. H. R. Rep. No. 94–1487, p. 16 (1976) (House Report); S. Rep. No. 94–1310, p. 16 (1976) (Senate Report). Nelson alleges that petitioners harmed him in the course of engaging in their commercial enterprise, as a direct result of their commercial acts. His claim, in other words, is "based upon commercial activity."

Indeed, I am somewhat at a loss as to what exactly the majority believes petitioners have done that a private employer could not. As countless cases attest, retaliation for whistle-blowing is not a practice foreign to the marketplace.[1] Congress passed a statute in response to such behavior, see Whistleblower Protection Act of 1989, 5 U. S. C. § 1213 *et seq.* (1988 ed., Supp. III), as have numerous States. On occasion, private employers also have been known to retaliate by enlisting the help of police officers to falsely arrest employees. See, *e. g., Rosario* v. *Amalgamated Ladies Garment Cutters' Union,* 605 F. 2d 1228, 1233, 1247–1248 (CA2 1979), cert. denied, 446 U. S. 919 (1980). More generally, private parties have been held liable for conspiring with public authorities to effectuate an arrest, see, *e. g., Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144 (1970), and for using private security personnel for the same purposes, see *Albright* v. *Longview Police Dept.,* 884 F. 2d 835, 841–842 (CA5 1989).

Therefore, had the hospital retaliated against Nelson by hiring thugs to do the job, I assume the majority—no longer able to describe this conduct as "a foreign state's exercise of the power of its police," *ante,* at 361—would consent to calling it "commercial." For, in such circumstances, the state-run hospital would be operating as any private participant in the marketplace and respondents' action would be based on the operation by Saudi Arabia's agents of a commercial business.[2]

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[1] See, *e. g., English* v. *General Electric Co.,* 496 U. S. 72, 75–76 (1990); *Belline* v. *K-Mart Corp.,* 940 F. 2d 184, 186–189 (CA7 1991); *White* v. *General Motors Corp.,* 908 F. 2d 669, 671 (CA10 1990), cert. denied, 498 U. S. 1069 (1991); *Sanchez* v. *Unemployment Ins. Appeals Bd.,* 36 Cal. 3d 575, 685 P. 2d 61 (1984); *Collier* v. *Superior Court of Los Angeles County,* 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453 (1991).

[2] "[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of . . . the accidents which it may cause. . . . The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties." Testimony of Monroe Leigh, Legal Adviser, Department of State, Hearings on H. R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess., 27 (1976).

At the heart of the majority's conclusion, in other words, is the fact that the hospital in this case chose to call in government security forces. See *ante*, at 362. I find this fixation on the intervention of police officers, and the ensuing characterization of the conduct as "peculiarly sovereign in nature," *ante*, at 361, to be misguided. To begin, it fails to capture respondents' complaint in full. Far from being directed solely at the activities of the Saudi police, it alleges that agents of the *hospital* summoned Nelson to its security office because he reported safety concerns and that the *hospital* played a part in the subsequent beating and imprisonment. App. 5, 14. Without more, that type of behavior hardly qualifies as sovereign. Thus, even assuming for the sake of argument that the role of the official police somehow affected the nature of petitioners' conduct, the claim cannot be said to "res[t] entirely upon activities sovereign in character." See *ante*, at 358, n. 4. At the very least it "consists of both commercial and sovereign elements," thereby presenting the specific question the majority chooses to elude. See *ibid.* The majority's single-minded focus on the exercise of police power, while certainly simplifying the case, thus hardly does it justice.[3]

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[3] In contrast, the cases cited by the majority involve action that did not take place in a commercial context and that could be considered purely sovereign. For instance, in *Arango* v. *Guzman Travel Advisors Corp.*, 621 F. 2d 1371 (CA5 1980), plaintiffs were expelled from the Dominican Republic pursuant to a decision by immigration officials that they were "'undesirable aliens.'" *Id.*, at 1373. As the Court of Appeals reasoned, the airline's actions "were not commercial. [It] was impressed into service to perform these functions . . . by Dominican immigration officials pursuant to that country's laws." *Id.*, at 1379. Nor was there a hint of commercial activity in *Herbage* v. *Meese*, 747 F. Supp. 60 (DC 1990), affirmance order, 292 U. S. App. D. C. 84, 946 F. 2d 1564 (1991), an extradition case that did not so much as mention the commercial activity exception.

Absence of a commercial context also distinguishes those incidents relied on by the majority that predate passage of the Foreign Sovereign Immunities Act. See *ante*, at 362, n. 5. Yet the majority gives short shrift to an occurrence that most closely resembles the instant case and

Reliance on the fact that Nelson's employer enlisted the help of public rather than private security personnel is also at odds with Congress' intent. The purpose of the commercial exception being to prevent foreign states from taking refuge behind their sovereignty when they act as market participants, it seems to me that this is precisely the type of distinction we should seek to avoid. Because both the hospital and the police are agents of the state, the case in my mind turns on whether the sovereign is acting in a commercial capacity, not on whether it resorts to thugs or government officers to carry on its business. That, when the hospital calls in security to get even with a whistle-blower, it comes clothed in police apparel says more about the state-owned nature of the commercial enterprise than about the noncommercial nature of its tortious conduct. I had thought the

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that suggests strongly that the hospital's enlistment of, and cooperation with, the police should not entitle it to immunity. The incident involved allegations that an agency of the Jamaican Government conspired to have Jamaican nationals working in the United States "falsely arrested, imprisoned and blacklisted, and to deprive them of wages and other employee rights." Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977 (M. Sandler, D. Vagts, & B. Ristau eds.), in 1977 Digest of United States Practice in International Law 1062. Significantly, the State Department did not take refuge behind the words "arres[t]" and "impriso[n]" and decide that the actions were sovereign in nature. Rather, it declined to recognize immunity, focusing on the fact that private parties acting in an employment context could do exactly what the Jamaican agency was alleged to have done: "[T]he activities under consideration are of a private nature . . . . The Department of State is impressed by the fact that the activities of the British West Indies Central Labour Organization . . . are very much akin to those that might be conducted by a labor union or by a private employment agency—arranging and servicing an agreement between private employers and employees. Although it may be argued that some of the acts performed by the British West Indies Central Labour Organization in this case are consular in nature, the Department believes that they arise from the involvement of the British West Indies Central Labour Organization in the private employer-employee contractual relationship rather than from a consular responsibility, and cannot be separated therefrom." *Id.*, at 1063.

issue put to rest some time ago when, in a slightly different context, Chief Justice Marshall observed:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." *Bank of United States* v. *Planters' Bank of Georgia,* 9 Wheat. 904, 907 (1824).

See also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U. S. 682, 695–696 (1976) (plurality opinion).

C

Contrary to the majority's suggestion, *ante,* at 363, this conclusion does not involve inquiring into the purpose of the conduct. Matters would be different, I suppose, if Nelson had been recruited to work in the Saudi police force and, having reported safety violations, suffered retributive punishment, for there the Saudi authorities would be engaged in distinctly sovereign activities. Cf. House Report, at 16 ("Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel"); Senate Report, at 16. The same would be true if Nelson was a mere tourist in Saudi Arabia and had been summarily expelled by order of immigration officials. See *Arango* v. *Guzman Travel Advisors Corp.,* 621 F. 2d 1371 (CA5 1980). In this instance, however, the state-owned hospital was engaged in ordinary commercial business and "[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens." *Alfred Dunhill, supra,* at 704 (plurality opinion). As we recently stated, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Republic of Argentina* v. *Weltover, Inc.,* 504 U. S. 607, 614 (1992). That, I believe, is the case here.

II

Nevertheless, I reach the same conclusion as the majority because petitioners' commercial activity was not "carried on in the United States." The Act defines such conduct as "commercial activity . . . having substantial contact with the United States." 28 U. S. C. § 1603(e). Respondents point to the hospital's recruitment efforts in the United States, including advertising in the American media, and the signing of the employment contract in Miami. See Brief for Respondents 43–45. As I earlier noted, while these may very well qualify as commercial activity in the United States, they do not constitute the commercial activity upon which respondents' action is based. Conversely, petitioners' commercial conduct in Saudi Arabia, though constituting the basis of the Nelsons' suit, lacks a sufficient nexus to the United States. Neither the hospital's employment practices, nor its disciplinary procedures, has any apparent connection to this country. On that basis, I agree that the Act does not grant the Nelsons access to our courts.

JUSTICE KENNEDY, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Parts I–B and II, concurring in part and dissenting in part.

I join all of the Court's opinion except the last paragraph of Part II, where, with almost no explanation, the Court rules that, like the intentional tort claim, the claims based on negligent failure to warn are outside the subject-matter jurisdiction of the federal courts. These claims stand on a much different footing from the intentional tort claims for purposes of the Foreign Sovereign Immunities Act (FSIA). In my view, they ought to be remanded to the District Court for further consideration.

I

A

I agree with the Court's holding that the Nelsons' claims of intentional wrongdoing by the hospital and the Kingdom of Saudi Arabia are based on sovereign, not commercial, activity, and so fall outside the commercial activity exception to the grant of foreign sovereign immunity contained in 28 U. S. C. § 1604. The intentional tort counts of the Nelsons' complaint recite the alleged unlawful arrest, imprisonment, and torture of Mr. Nelson by the Saudi police acting in their official capacities. These are not the sort of activities by which a private party conducts its business affairs; if we classified them as commercial, the commercial activity exception would in large measure swallow the rule of foreign sovereign immunity Congress enacted in the FSIA.

B

By the same token, however, the Nelsons' claims alleging that the hospital, the Kingdom, and Royspec were negligent in failing during their recruitment of Nelson to warn him of foreseeable dangers are based upon commercial activity having substantial contact with the United States. As such, they are within the commercial activity exception and the jurisdiction of the federal courts. Unlike the intentional tort counts of the complaint, the failure to warn counts do not complain of a police beating in Saudi Arabia; rather, they complain of a negligent omission made during the recruiting of a hospital employee in the United States. To obtain relief, the Nelsons would be obliged to prove that the hospital's recruiting agent did not tell Nelson about the foreseeable hazards of his prospective employment in Saudi Arabia. Under the Court's test, this omission is what the negligence counts are "based upon." See *ante*, at 356.

Omission of important information during employee recruiting is commercial activity as we have described it. See *Republic of Argentina* v. *Weltover, Inc.*, 504 U. S. 607 (1992). It seems plain that recruiting employees is an activity undertaken by private hospitals in the normal course of business. Locating and hiring employees implicates no power unique to the sovereign. In explaining the terms and conditions of employment, including the risks and rewards of a particular job, a governmental entity acts in "the manner of a private player within" the commercial marketplace. *Id.*, at 614. Under the FSIA, as a result, it must satisfy the same general duties of care that apply to private actors under state law. If a private company with operations in Saudi Arabia would be obliged in the course of its recruiting activities subject to state law to tell a prospective employee about the risk of arbitrary arrest and torture by Saudi authorities, then so would King Faisal Specialist Hospital.

The recruiting activity alleged in the failure to warn counts of the complaint also satisfies the final requirement for invoking the commercial activity exception: that the claims be based upon commercial activity "having substantial contact with the United States." 28 U. S. C. § 1603(e). Nelson's recruitment was performed by Hospital Corporation of America, Ltd. (HCA), a wholly owned subsidiary of a United States corporation, which, for a period of at least 16 years beginning in 1973, acted as the Kingdom of Saudi Arabia's exclusive agent for recruiting employees for the hospital. HCA in the regular course of its business seeks employees for the hospital in the American labor market. HCA advertised in an American magazine, seeking applicants for the position Nelson later filled. Nelson saw the ad in the United States and contacted HCA in Tennessee. After an interview in Saudi Arabia, Nelson returned to Florida, where he signed an employment contract and underwent personnel processing and application procedures. Before leaving to take his job at the hospital, Nelson attended an orientation session conducted by HCA in Tennessee for new employees. These activities have more than substantial contact with the United States; most of them were "carried on in the United States." 28 U. S. C. § 1605(a)(2). In alleging that the petitioners neglected during these activities to tell him what they were bound to under state law, Nelson meets all of the statutory requirements for invoking federal jurisdiction under the commercial activity exception.

II

Having met the jurisdictional prerequisites of the FSIA, the Nelsons' failure to warn claims should survive petitioners' motion under Federal Rule of Civil Procedure 12(b)(1) to dismiss for want of subject-matter jurisdiction. Yet instead of remanding these claims to the District Court for further proceedings, the majority dismisses them in a single short paragraph. This is peculiar, since the Court suggests no reason to question the conclusion that the failure to warn claims are based on commercial activity having substantial contact with the United States; indeed, the Court does not purport to analyze these claims in light of the statutory requirements for jurisdiction.

The Court's summary treatment may stem from doubts about the underlying validity of the negligence cause of action. The Court dismisses the claims because it fears that if it did not, "a plaintiff could recast virtually any claim of intentional tort committed by a sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it." *Ante*, at 363. In the majority's view, "[t]o give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity." *Ibid.* These doubts, however, are not relevant to the analytical task at hand.

The FSIA states that with respect to any claim against a foreign sovereign that falls within the statutory exceptions to immunity listed in § 1605, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 1606. The Act incorporates state law and "was not intended to affect the substantive law determining the liability of a foreign state." *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba,* 462 U. S. 611, 620 (1983). If the governing state law, which has not yet been determined, would permit an injured person to plead and prove a tortious wrong for failure to warn against a private defendant under facts similar to those in this case, we have no authority under the FSIA to ordain otherwise for those suing a sovereign entity. "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *Id.,* at 622, n. 11.

The majority's citation of *United States* v. *Shearer,* 473 U. S. 52, 54–55 (1985) (opinion of Burger, C. J.), see *ante,* at 363, provides no authority for dismissing the failure to warn claims. *Shearer* refused to permit a plaintiff to recast in negligence terms what was essentially an intentional tort claim, but that case was decided under the doctrine of *Feres* v. *United States,* 340 U. S. 135 (1950). The *Feres* doctrine is a creature of federal common law that allows the Court much greater latitude to make rules of pleading than we have in the current case. Here, our only task is to interpret the explicit terms of the FSIA. The Court's conclusion in *Shearer* was also based upon the fact that the intentional tort exception to the Federal Tort Claims Act at issue there, 28 U. S. C. § 2680(h), precludes "[a]ny claim arising out of" the specified intentional torts. This language suggests that Congress intended immunity under the FTCA to cover more than those claims which simply sounded in intentional tort. There is no equivalent language in the commercial activity exception to the FSIA. It is also worth noting that the Court has not adopted a uniform rule barring the recasting of intentional tort claims as negligence claims under the FTCA; under certain circumstances, we have permitted recovery in that situation. See *Sheridan* v. *United States,* 487 U. S. 392 (1988).

As a matter of substantive tort law, it is not a novel proposition or a play on words to describe with precision the conduct upon which various causes of action are based or to recognize that a single injury can arise from multiple causes, each of which constitutes an actionable wrong. See Restatement (Second) of Torts §§447–449 (1965); *Sheridan, supra,* at 405 (KENNEDY, J., concurring in judgment); *Wilson* v. *Garcia,* 471 U. S. 261, 272 (1985). In *Sheridan,* for example, this Court permitted an action for negligent supervision to go forward under the FTCA when a suit based upon the intentional tort that was the immediate cause of injury was barred under the statute. See 487 U. S., at 400. As the Court observed, "it is both settled and undisputed that in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur." *Id.,* at 398.

We need not determine, however, that on remand the Nelsons will succeed on their failure to warn claims. Quite apart from potential problems of state tort law that might bar recovery, the Nelsons appear to face an obstacle based upon the former adjudication of their related lawsuit against Saudi Arabia's recruiting agent, HCA. The District Court dismissed that suit, which raised an identical failure to warn claim, not only as time barred, but also on the merits. See *Nelson* v. *Hospital Corp. of America,* No. 88–0484–CIV–Nesbitt (SD Fla., Nov. 1, 1990). That decision was affirmed on appeal, judgment order reported at 946 F. 2d 1546 (CA11 1991), and may be entitled to preclusive effect with respect to the Nelsons' similar claims against the sovereign defendants, whose recruitment of Nelson took place almost entirely through HCA. See generally *Montana* v. *United States,* 440 U. S. 147, 153 (1979) ("a final judgment on the merits bars further claims by parties or their privies based on the same cause of action"); *Lawlor* v. *National Screen Service Corp.,* 349 U. S. 322, 330 (1955) (defendants not party to a prior suit may invoke res judicata if "their liability was . . . 'altogether dependent upon the culpability' of the [prior] defendants") (quoting *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.,* 225 U. S. 111, 127 (1912)); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4463, p. 567 (1981) (recognizing general rule that "judgment in an action against either party to a vicarious liability relationship establishe[s] preclusion in favor of the other"); Restatement (Second) of Judgments § 51 (1982).

But the question of claim preclusion, like the substantive validity under state law of the Nelsons' negligence cause of action, has not yet been litigated and is outside the proper sphere of our review. "[I]t is not our practice to reexamine a question of state law of [this] kind or, without good reason, to pass upon it in the first instance." *Sheridan, supra,* at 401. That a remand to the District Court may be of no avail to the Nelsons is irrelevant to our task here; if the jurisdictional requirements of the FSIA are met, the case must be remanded to the trial court for further proceedings. In my view, the FSIA conferred subject-matter jurisdiction on the District Court to entertain the failure to warn claims, and with all respect, I dissent from the Court's refusal to remand them.

JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

I join JUSTICE WHITE's opinion because it finds that respondents' intentional tort claims are "based upon a commercial activity" and that the commercial activity at issue in those claims was not "carried on in the United States." I join JUSTICE KENNEDY's opinion insofar as it concludes that the "failure to warn" claims should be remanded.

JUSTICE STEVENS, dissenting.

Under the Foreign Sovereign Immunities Act of 1976 (FSIA), a foreign state is subject to the jurisdiction of American courts if two conditions are met: The action must be "based upon a commercial activity" and that activity must have a "substantial contact with the United States."[1] These two conditions should be separately analyzed because they serve two different purposes. The former excludes commercial activity from the scope of the foreign sovereign's immunity from suit; the second identifies the contacts with the United States that support the assertion of jurisdiction over the defendant.[2]

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[1] Section 4(a) of the FSIA provides:

"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . . .

"(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U. S. C. § 1605(a)(2).

The key terms of this provision are defined in § 1603. Section 1603(e) defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." Section 1603(d), in turn, defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." Thus, interpolating the definitions from § 1603 into § 1605(a)(2) produces this equivalence:

"A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a regular course of commercial conduct or a particular commercial transaction carried on by such state and having substantial contact with the United States."

[2] See, *e. g., Maritime International Nominees Establishment* v. *Republic of Guinea*, 224 U. S. App. D. C. 119, 130, n. 18, 693 F. 2d 1094, 1105, n. 18 (1982) ("the immunity determination involves considerations distinct from the issue of personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind"). See also J. Dellapenna, Suing Foreign Governments and Their

In this case, as JUSTICE WHITE has demonstrated, petitioner Kingdom of Saudi Arabia's operation of the hospital and its employment practices and disciplinary procedures are "commercial activities" within the meaning of the statute, and respondent Scott Nelson's claim that he was punished for acts performed in the course of his employment was unquestionably "based upon" those activities. Thus, the first statutory condition is satisfied; petitioner is not entitled to immunity from the claims asserted by respondent.

Unlike JUSTICE WHITE, however, I am also convinced that petitioner's commercial activities—whether defined as the regular course of conduct of operating a hospital or, more specifically, as the commercial transaction of engaging respondent "as an employee with specific responsibilities in that enterprise," Brief for Respondents 25—have sufficient contact with the United States to justify the exercise of federal jurisdiction. Petitioner Royspec maintains an office in Maryland and purchases hospital supplies and equipment in this country. For nearly two decades the hospital's American agent has maintained an office in the United States and regularly engaged in the recruitment of personnel in this country. Respondent himself was recruited in the United States and entered into his employment contract with the hospital in the United States. Before traveling to Saudi Arabia to assume his position at the hospital, respondent attended an orientation program in Tennessee. The position for which respondent was recruited and ultimately hired was that of a monitoring systems manager, a troubleshooter, and, taking respondent's allegations as true, it was precisely respondent's performance of those responsibilities that led to the hospital's retaliatory actions against him.

Corporations 66, 144 (1988) ("The nexus rules must be analyzed separately from the substantive immunity rules . . . in order to understand jurisdictional questions under the Act" and because "the laws regulating . . . jurisdiction . . . and immunity serve different purposes, and thus require different dispositions") (footnotes omitted).

Whether the first clause of § 1605(a)(2) broadly authorizes "general" jurisdiction over foreign entities that engage in substantial commercial activity in this country, or, more narrowly, authorizes only "specific" jurisdiction over particular commercial claims that have a substantial contact with the United States,[3] petitioners' contacts with the United States in this case are, in my view, plainly sufficient to subject petitioners to suit in this country on a claim arising out of their nonimmune commercial activity relating to respondent. If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone of our inquiry; for as JUSTICE WHITE explains, *ante*, at 366, n. 2, and 368–369, when a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by that marketplace. I would therefore affirm the judgment of the Court of Appeals.[4]

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[3] Though this case does not require resolution of that question (because petitioners' contacts with the United States satisfy, in my view, the more narrow requirements of "specific" jurisdiction), I am inclined to agree with the view expressed by Judge Higginbotham in his separate opinion in *Vencedora Oceanica Navigacion, S. A.* v. *Compagnie Nationale Algerienne de Navigation*, 730 F. 2d 195, 204–205 (1984) (concurring in part and dissenting in part), that the first clause of § 1605(a)(2), interpreted in light of the relevant legislative history and the second and third clauses of the provision, does authorize "general" jurisdiction over foreign entities that engage in substantial commercial activities in the United States.

[4] My affirmance would extend to respondents' failure to warn claims. I am therefore in agreement with JUSTICE KENNEDY's analysis of that aspect of the case.

PIONEER INVESTMENT SERVICES CO. *v.* BRUNSWICK ASSOCIATES LIMITED PARTNERSHIP ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91–1695. Argued November 30, 1992—Decided March 24, 1993

As unsecured creditors of petitioner—a company seeking relief under Chapter 11 of the Bankruptcy Code—respondents were required to file proofs of claim with the Bankruptcy Court before the deadline, or bar date, established by that court. An August 3, 1989, bar date was included in a "Notice for Meeting of Creditors" received from the court by Mark Berlin, an official for respondents. Respondents' attorney was provided with a complete copy of the case file and, when asked, assertedly assured Berlin that no bar date had been set. On August 23, 1989, respondents asked the court to accept their proofs under Bankruptcy Rule 9006(b)(1), which allows a court to permit late filings where the movant's failure to comply with the deadline "was the result of excusable neglect." The court refused, holding that a party may claim excusable neglect only if the failure to timely perform was due to circumstances beyond its reasonable control. The District Court remanded the case, ordering the Bankruptcy Court to evaluate respondents' conduct under a more liberal standard. The Bankruptcy Court applied that standard and again denied the motion, finding that several factors—the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, and whether the creditor acted in good faith—favored respondents, but that the delay was within their control and that they should be penalized for their counsel's mistake. The District Court affirmed, but the Court of Appeals reversed. It found that the Bankruptcy Court had inappropriately penalized respondents for their counsel's error, since Berlin had asked the attorney about the impending deadlines and since the peculiar and inconspicuous placement of the bar date in a notice for a creditors' meeting without any indication of the date's significance left a dramatic ambiguity in the notification that would have confused even a person experienced in bankruptcy.

Held:

1. An attorney's inadvertent failure to file a proof of claim by the bar date can constitute "excusable neglect" within the meaning of Rule 9006(b)(1). Pp. 387–397.

(a) Contrary to petitioner's suggestion, Congress plainly contemplated that the courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, not just those caused by intervening circumstances beyond the party's control. This flexible understanding comports with the ordinary meaning of "neglect." It also accords with the underlying policies of Chapter 11 and the bankruptcy rules, which entrust broad equitable powers to the courts in order to ensure the success of a debtor's reorganization. In addition, this view is confirmed by the history of the present bankruptcy rules and is strongly supported by the fact that the phrase "excusable neglect," as used in several of the Federal Rules of Civil Procedure, is understood to be a somewhat "elastic concept." Pp. 387–395.

(b) The determination of what sorts of neglect will be considered "excusable" is an equitable one, taking account of all relevant circumstances. These include the first four factors applied in the instant case. However, the Court of Appeals erred in not attributing to respondents the fault of their counsel. Clients may be held accountable for their attorney's acts and omissions. See, *e. g., Link* v. *Wabash R. Co.,* 370 U. S. 626. Thus, in determining whether respondents' failure to timely file was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable. Pp. 395–397.

2. The neglect of respondents' counsel was, under all the circumstances, excusable. As the Court of Appeals found, the lack of any prejudice to the debtor or to the interest of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim. As for the culpability of respondents' counsel, it is significant that the notice of the bar date in this case was outside the ordinary course in bankruptcy cases. Normally, such a notice would be prominently announced and accompanied by an explanation of its significance, not inconspicuously placed in a notice regarding a creditors' meeting. Pp. 397–399.

943 F. 2d 673, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which SCALIA, SOUTER, and THOMAS, JJ., joined, *post,* p. 399.

Craig J. Donaldson argued the cause and filed briefs for petitioner.

John A. Lucas argued the cause for respondents. With him on the brief was *Lansing R. Palmer.*

JUSTICE WHITE delivered the opinion of the Court.

Rule 3003(c) of the Federal Rules of Bankruptcy Procedure sets out the requirements for filing proofs of claim in Chapter 9 Municipality and Chapter 11 Reorganization cases.[1] Rule 3003(c)(3) provides that the "court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Rule 9006 is a general rule governing the computation, enlargement, and reduction of periods of time prescribed in other bankruptcy rules. Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline "was the result of excusable neglect."[2] In this case, we are

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[1] Bankruptcy Rule 3003(c), in relevant part, provides:

"(c) Filing Proof of Claim.

"(1) *Who May File.* Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

"(2) *Who Must File.* Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

"(3) *Time for Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4)."

[2] Bankruptcy Rule 9006(b) provides:

"(b) Enlargement.

"(1) *In General.* Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiracalled upon to decide whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute "excusable neglect" within the meaning of the Rule. Finding that it can, we affirm.

I

On April 12, 1989, petitioner filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the Eastern District of Tennessee. The petition sought relief under Chapter 11 of the Bankruptcy Code. Petitioner also filed a list of its 20 largest unsecured creditors, including all but one of respondents here. The following month, after obtaining extensions of time from the Bankruptcy Court, petitioner filed a statement of financial affairs and schedules of its assets and liabilities. The schedules, as amended, listed all of the respondents except Ft. Oglethorpe Associates Limited Partnership as creditors holding contingent, unliquidated, or disputed claims; the Ft. Oglethorpe partnership was not listed at all. Under § 1111 of the Bankruptcy Code, 11 U. S. C. § 1111(a), and Bankruptcy Rule 3003(c)(2), all such creditors are required to file a proof of claim with the bankruptcy court before the deadline, or "bar date," established by the court.

On April 13, 1989, the day after petitioner filed its Chapter 11 petition, the Bankruptcy Court mailed a "Notice for Meeting of Creditors" to petitioner's creditors. Along with the announcement of a May 5 meeting was the following passage:

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tion of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

"(2) *Enlargement Not Permitted.* The court may not enlarge the time for taking action under Rules 1007(d), 1017(b)(3), 2003(a) and (d), 7052, 9023, and 9024.

"(3) *Enlargment Limited.* The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules."

> "You must file a proof of claim if your claim is scheduled as disputed, contingent or unliquidated, is unlisted or you do not agree with the amount. See 11 U. S. C. Sec. 1111 & Bankruptcy rule 3003. Bar date is August 3, 1989." App. 29a.

The notice was received and read by Mark A. Berlin, president of the corporate general partners of each of the respondents. Berlin duly attended the creditors' meeting on May 5. The following month, respondents retained an experienced bankruptcy attorney, Marc Richards, to represent them in the proceedings. Berlin stated in an affidavit that he provided Richards with a complete copy of the case file, including a copy of the court's April 13, 1989, notice to creditors. Berlin also asserted that he inquired of Richards whether there was a deadline for filing claims and that Richards assured him that no bar date had been set and that there was no urgency in filing proofs of claim. *Id.*, at 121a. Richards and Berlin both attended a subsequent meeting of creditors on June 16, 1989.

Respondents failed to file any proofs of claim by the August 3, 1989, bar date. On August 23, 1989, respondents filed their proofs, along with a motion that the court permit the late filing under Rule 9006(b)(1). In particular, respondents' counsel explained that the bar date, of which he was unaware, came at a time when he was experiencing "a major and significant disruption" in his professional life caused by his withdrawal from his former law firm on July 31, 1989. *Id.*, at 56a. Because of this disruption, counsel did not have access to his copy of the case file in this matter until mid-August. *Ibid.*

The Bankruptcy Court refused the late filing. Following precedent from the Court of Appeals for the Eleventh Circuit, the court held that a party may claim "excusable neglect" only if its "'failure to timely perform a duty was due to circumstances which were beyond [its] reasonable [c]ontrol.'" *Id.*, at 124a (quoting *In re South Atlantic Financial*

Corp., 767 F. 2d 814, 817 (CA11 1985) (some internal quotation marks omitted), cert. denied *sub nom. Biscayne 21 Condominium Associates, Inc.* v. *South Atlantic Financial Corp.*, 475 U. S. 1015 (1986)). Finding that respondents had received notice of the bar date and could have complied, the court ruled that they could not claim "excusable neglect."

On appeal, the District Court affirmed in part and reversed in part. The court found "respectable authority for the narrow reading of 'excusable neglect'" adopted by the Bankruptcy Court, but concluded that the Court of Appeals for the Sixth Circuit would follow "a more liberal approach." App. 157a. Embracing a test announced by the Court of Appeals for the Ninth Circuit, the District Court remanded with instructions that the Bankruptcy Court evaluate respondents' conduct against several factors, including: "'"(1) whether granting the delay will prejudice the debtor; (2) the length of the delay and its impact on efficient court administration; (3) whether the delay was beyond the reasonable control of the person whose duty it was to perform; (4) whether the creditor acted in good faith; and (5) whether clients should be penalized for their counsel's mistake or neglect."'" *Id.*, at 158a–159a (quoting *In re Dix*, 95 B. R. 134, 138 (CA9 Bkrtcy. Appellate Panel 1988) (in turn quoting *In re Magouirk*, 693 F. 2d 948, 951 (CA9 1982))). The District Court also suggested that the Bankruptcy Court consider whether the failure to comply with the bar date "resulted from negligence, indifference or culpable conduct on the part of a moving creditor or its counsel." App. 159a.

On remand, the Bankruptcy Court applied the so-called *Dix* factors and again denied respondents' motion. Specifically, the Bankruptcy Court found (1) that petitioner would not be prejudiced by the late filings; (2) that the 20-day delay in filing the proofs of claim would have no adverse impact on efficient court administration; (3) that the reason for the delay was not outside respondents' control; (4) that respondents and their counsel acted in good faith; and (5) that, in light of Berlin's business sophistication and his actual knowledge of the bar date, it would not be improper to penalize respondents for the neglect of their counsel. App. 168a–172a. The court also found that respondents' counsel was negligent in missing the bar date and, "[t]o a degree," indifferent to it. *Id.*, at 172a. In weighing these considerations, the Bankruptcy Court "attache[d] considerable importance to *Dix* factors 3 and 5," and concluded that a ruling in respondents' favor, notwithstanding their actual notice of the bar date, "would render nugatory the fixing of the claims' bar date in this case." *Id.*, at 173a. The District Court affirmed the ruling.

The Court of Appeals for the Sixth Circuit reversed. The Court of Appeals agreed with the District Court that "excusable neglect" was not limited to cases where the failure to act was due to circumstances beyond the movant's control. The Court of Appeals also agreed with the District Court that the five "*Dix* factors" were helpful, although not necessarily exhaustive, guides. *In re Pioneer Investment Services Co.*, 943 F. 2d 673, 677 (1991). The court found, however, that the Bankruptcy Court had misapplied the fifth *Dix* factor to this case. Because Berlin had inquired of counsel whether there were any impending filing deadlines and been told that none existed, the Court of Appeals ruled that the Bankruptcy Court had "inappropriately penalized the [respondents] for the errors of their counsel." 943 F. 2d, at 677.

The Court of Appeals also found "it significant that the notice containing the bar date was incorporated in a document entitled 'Notice for Meeting of Creditors.'" *Id.*, at 678. "Such a designation," the court explained, "would not have put those without extensive experience in bankruptcy on notice that the date appended to the end of this notice was intended to be the final date for filing proof of claims." *Ibid.* Indeed, based on a comparison between the notice in this case and the model notice set out in Official Bankruptcy Form 16, the court concluded that the notice given respondents contained a "dramatic ambiguity," which could well have confused "[e]ven persons experienced in bankruptcy." *Ibid.* Having determined that the fifth *Dix* factor favored respondents rather than petitioner, the Court of Appeals found that the record demonstrated "excusable neglect."

Because of the conflict in the Courts of Appeals over the meaning of "excusable neglect,"[3] we granted certiorari, 504 U. S. 984 (1992), and now affirm.

II

A

There is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline. At one end of the spectrum, a party may be prevented from complying by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other, a party simply may choose to flout a deadline. In between lie cases where a party may *choose* to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence. Petitioner contends that the Bankruptcy Court was correct when it first interpreted Rule 9006(b)(1) to require a showing that the movant's failure to comply with the court's deadline was caused by circumstances beyond its reasonable control. Petitioner suggests that exacting enforcement of filing deadlines is essential to the Bankruptcy Code's goals of certainty and finality in resolving disputed claims. Under petitioner's view, any showing of fault on the part of the late filer would defeat a claim of "excusable neglect."

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[3] The Courts of Appeals for the Fourth, Seventh, Eighth, and Eleventh Circuits have taken a narrow view of "excusable neglect" under Rule 9006(b)(1), requiring a showing that the delay was caused by circumstances beyond the movant's control. See *In re Davis,* 936 F. 2d 771, 774 (CA4 1991); *In re Danielson,* 981 F. 2d 296, 298 (CA7 1992); *Hanson* v. *First Bank of South Dakota, N. A.,* 828 F. 2d 1310, 1314–1315 (CA8 1987); *In re Analytical Systems, Inc.,* 933 F. 2d 939, 942 (CA11 1991). The Court of Appeals for the Tenth Circuit, by contrast, has applied a more flexible analysis similar to that employed by the Court of Appeals in the present case. *In re Centric Corp.,* 901 F. 2d 1514, 1517–1518, cert. denied *sub nom. Trustees of Centennial State Carpenters Pension Trust Fund* v. *Centric Corp.,* 498 U. S. 852 (1990). The Courts of Appeals similarly have divided in their interpretations of "excusable neglect" as found in Rule 4(a)(5) of the Federal Rules of Appellate Procedure. Some courts have required a showing that the movant's failure to meet the deadline was beyond its control, see, *e. g., 650 Park Ave. Corp.* v. *McRae,* 836 F. 2d 764, 767 (CA2 1988); *Pratt* v. *McCarthy,* 850 F. 2d 590, 592 (CA9 1988), while others have adopted a more flexible approach similar to that employed by the Court of Appeals in this case, see, *e. g., Consolidated Freightways Corp. of Delaware* v. *Larson,* 827 F. 2d 916 (CA3 1987), cert. denied *sub nom. Consolidated Freightways Corp.* v. *Secretary of Transp. of Pennsylvania,* 484 U. S. 1032 (1988); *Lorenzen* v. *Employees Retirement Plan of Sperry-Hutchinson Co.,* 896 F. 2d 228, 232–233 (CA7 1990).

We think that petitioner's interpretation is not consonant with either the language of the Rule or the evident purposes underlying it. First, the Rule grants a reprieve to out-of-time filings that were delayed by "neglect." The ordinary meaning of "neglect" is "to give little attention or respect" to a matter, or, closer to the point for our purposes, "to leave undone or unattended to *esp[ecially] through carelessness.*" Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry "their ordinary, contemporary, common meaning." *Perrin* v. *United States,* 444 U. S. 37, 42 (1979). Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Contrary to petitioner's suggestion, this flexible understanding of "excusable neglect" accords with the policies underlying Chapter 11 and the bankruptcy rules. The "excusable neglect" standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in Chapter 7 cases.[4] The rules' differentiation between Chapter 7 and Chapter 11 filings corresponds with the differing policies of the two chapters. Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors. See *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 203 (1983). In overseeing this latter process, the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization. See *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 527–528 (1984). This context suggests that Rule 9006's allowance for late filings due to "excusable neglect" entails a correspondingly equitable inquiry.

The history of the present bankruptcy rules confirms this view. Rule 9006(b) is derived from Rule 906(b) of the former bankruptcy rules, which governed bankruptcy proceedings under the former Bankruptcy Act. Like Rule 9006(b)(1), former Rule 906(b) permitted courts to accept late filings "where the failure to act was the result of excusable neglect." The forerunner of Rule 3003(c), which now establishes the requirements for filing claims in Chapter 11 cases, was former Rule 10–401(b), which established the filing requirements for proofs of claim in reorganization cases under Chapter X of the former Act, Chapter 11's predecessor. The Advisory Committee's Notes accompanying that former Rule make clear that courts were entrusted with the authority under Rules 10–401(b) and 906(b) to accept tardy filings "in accordance with the equities of the situation":

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[4] The time-computation and time-extension provisions of Rule 9006, like those of Federal Rule of Civil Procedure 6, are generally applicable to any time requirement found elsewhere in the rules unless expressly excepted. Subsections (b)(2) and (b)(3) of Rule 9006 enumerate those time requirements excluded from the operation of the "excusable neglect" standard. One of the time requirements listed as excepted in Rule 9006(b)(3) is that governing the filing of proofs of claim in Chapter 7 cases. Such filings are governed exclusively by Rule 3002(c). See Rule 9006(b)(3); *In re Coastal Alaska Lines, Inc.*, 920 F. 2d 1428, 1432 (CA9 1990). By contrast, Rule 9006(b) does not make a similar exception for Rule 3003(c), which, as noted earlier, establishes the time requirements for proofs of claim in Chapter 11 cases. Consequently, Rule 9006(b)(1) must be construed to govern the permissibility of late filings in Chapter 11 bankruptcies. See Advisory Committee's Note accompanying Rule 9006(b)(1).

> "If the court has fixed a bar date for the filing of proofs of claim, it may still enlarge that time within the provisions of Bankruptcy Rule 906(b) which is made applicable in this subdivision. This policy is in accord with Chapter X generally which is to preserve rather than to forfeit rights. In § 102 it rejects the notion expressed in § 57n of the Act that claims must be filed within a six-month period to participate in any distribution. Section 224(4) of Chapter X of the Act permits distribution to certain creditors even if they fail to file claims and § 204 fixes a minimum period of 5 years before distribution rights under a plan may be forfeited. This approach was intentional as expressed in Senate Report 1916 (75th Cong., 3d Sess., April 20, 1938):
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> "'Sections 204 and 205 insure participation in the benefits of the reorganization to those who, through inadvertence or otherwise, have failed to file their claims or otherwise evidence their interests during the pendency of the proceedings.'
>
> "This attitude is carried forward in the rules, first by dispensing with the need to file proofs of claims and stock interests in most instances and, secondly, by permitting enlargement of the fixed bar date in a particular

> case with leave of court and for cause shown in accordance with the equities of the situation." Advisory Committee's Note accompanying Rule 10–401(b), reprinted in 13A J. Moore & L. King, Collier on Bankruptcy ¶ 10–401.01, p. 10–401–4 (14th ed. 1977).

This history supports our conclusion that the enlargement of prescribed time periods under the "excusable neglect" standard of Rule 9006(b)(1) is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer.

Our view that the phrase "excusable neglect" found in Bankruptcy Rule 9006(b)(1) is not limited as petitioner would have it is also strongly supported by the Federal Rules of Civil Procedure, which use that phrase in several places. Indeed, Rule 9006(b)(1) was patterned after Rule 6(b) of those Rules.[5] Under Rule 6(b), where the specified period for the performance of an act has elapsed, a district court may enlarge the period and permit the tardy act where the omission is the "result of excusable neglect."[6] As with Rule 9006(b)(1), there is no indication that anything other than the commonly accepted meaning of the phrase was intended by its drafters. It is not surprising, then, that in applying Rule 6(b), the Courts of Appeals have generally recognized that

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[5] See Advisory Committee's Note accompanying Rule 9006(b).

[6] Federal Rule of Civil Procedure 6(b) provides:

"(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

"excusable neglect" may extend to inadvertent delays.[7] Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear that "excusable neglect" under Rule 6(b) is a somewhat "elastic concept"[8] and is not limited strictly to omissions caused by circumstances beyond the control of the movant.[9]

The "excusable neglect" standard for allowing late filings is also used elsewhere in the Federal Rules of Civil Procedure. When a party should have asserted a counterclaim but did not, Rule 13(f) permits the counterclaim to be set up by amendment where the omission is due to "oversight, inadvertence, or excusable neglect, or when justice requires." In the context of such a provision, it is difficult indeed to imagine that "excusable neglect" was intended to be limited as petitioner insists it should be.[10]

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[7] See, *e. g., United States* v. *Borromeo,* 945 F. 2d 750, 753–754 (CA4 1991); *Hill* v. *Marshall,* No. 86–3987, 1988 U. S. App. LEXIS 14742, *4 (CA6, Nov. 4, 1988); *Dominic* v. *Hess Oil V. I. Corp.,* 841 F. 2d 513, 517 (CA3 1988); *Sony Corp.* v. *Elm State Electronics, Inc.,* 800 F. 2d 317, 319 (CA2 1986); *United States ex rel. Robinson* v. *Bar Assn. of District of Columbia,* 89 U. S. App. D. C. 185, 186, 190 F. 2d 664, 665 (1951). But see *Hewlett-Packard Co.* v. *Olympus Corp.,* 931 F. 2d 1551, 1552–1553 (CA Fed. 1991).

[8] 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, p. 479 (2d ed. 1987).

[9] The Courts of Appeals generally have given a similar interpretation to "excusable neglect" in the context of Rule 45(b) of the Federal Rules of Criminal Procedure, which, like Rule 9006(b), was modeled after Rule 6(b). See, *e. g., United States* v. *Roberts,* 978 F. 2d 17, 21–24 (CA1 1992); *Warren* v. *United States,* 123 U. S. App. D. C. 160, 163, 358 F. 2d 527, 530 (1965); *Calland* v. *United States,* 323 F. 2d 405, 407–408 (CA7 1963).

[10] In assessing what constitutes "excusable neglect" under Rule 13(f), the lower courts have looked, *inter alia,* to the good faith of the claimant, the extent of the delay, and the danger of prejudice to the opposing party. See, *e. g., New York Petroleum Corp.* v. *Ashland Oil, Inc.,* 757 F. 2d 288, 291 (Temp. Emerg. Ct. App. 1985); *Gaines* v. *Farese,* No. 87–5567, 1990 U. S. App. LEXIS 18086, *9 (CA6, Oct. 11, 1990); *Barrett* v. *United States Banknote Corp.,* 1992–2 Trade Cases ¶ 69,956, p. 68,607 (SDNY 1992);

The same is true of Rule 60(b)(1), which permits courts to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect," but only on motion made within one year of the judgment. Rule 60(b)(6) goes further, however, and empowers the court to reopen a judgment even after one year has passed for "any other reason justifying relief from the operation of the judgment." These provisions are mutually exclusive, and thus a party who failed to take timely action due to "excusable neglect" may not seek relief more than a year after the judgment by resorting to subsection (6). *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 863, and n. 11 (1988). To justify relief under subsection (6), a party must show "extraordinary circumstances" suggesting that the party is faultless in the delay. See *ibid.; Ackermann* v. *United States*, 340 U. S. 193, 197–200 (1950); *Klapprott* v. *United States*, 335 U. S. 601, 613–614 (1949). If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable. In *Klapprott*, for example, the petitioner had been effectively prevented from taking a timely appeal of a judgment by incarceration, ill health, and other factors beyond his reasonable control. Four years after a default judgment had been entered against him, he sought to reopen the matter under Rule 60(b) and was permitted to do so. As explained by Justice Black:

> "It is contended that the one-year limitation [of subsection (1)] bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And of course, the one-year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of

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Technographics, Inc. v. *Mercer Corp.*, 142 F. R. D. 429, 430 (MD Pa. 1992). Federal Rule of Bankruptcy Procedure 7013 contains a similar allowance for late counterclaims brought by a trustee or debtor in possession.

> 60(b). But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend . . . due to inadvertence, indifference, or careless disregard of consequences." *Id.*, at 613.

Justice Frankfurter, although dissenting on other grounds, agreed that Klapprott's allegations of *inability* to comply with earlier deadlines took his case outside the scope of "excusable neglect" "because 'neglect' in the context of its subject matter carries the idea of negligence and not merely of non-action." *Id.*, at 630.

Thus, at least for purposes of Rule 60(b), "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence. Because of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "neglect." See *Klapprott, supra.*[11] This latter result, however, would not obtain under Bankruptcy Rule 9006(b)(1). Had respondents here been prevented from complying with the bar date by an act of God or some other circumstance beyond their control, the Bankruptcy Court plainly would have been permitted to find "excusable neglect." At the same time, reading Rule 9006(b)(1) inflexibly to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word "neglect" and would be at odds with the accepted meaning of that word in analogous contexts.[12]

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[11] A similar, but even more explicit, dichotomy can be found in a former Rule of the Court of Appeals for the Second Circuit governing the late filing of appeals. That Rule permitted late filings "'upon a showing . . . (a) that the delay has been due to cause beyond the control of the moving party or (b) that the delay has been due to circumstances which shall be deemed to be merely excusable neglect . . . .'" Rule 15(2), U. S. C. C. A., Second Circuit, quoted in *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695, 703, n. 10 (1947). Although the meaning given "excusable neglect" for purposes of this Rule obviously is not controlling for purposes of Rule 9006(b)(1), it does suggest that the meaning of "excusable neglect" urged by petitioner is far from natural.

B

This leaves, of course, the Rule's requirement that the party's neglect of the bar date be "excusable." It is this requirement that we believe will deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1). With regard to determining whether a party's neglect of a deadline is excusable, we are in substantial agreement with the factors identified by the Court of Appeals. Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.[13] These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. See 943 F. 2d, at 677.[14]

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[12] See also *United States* v. *Boyle*, 469 U. S. 241, 245, n. 3 (1985) ("neglect" as used in statute governing late filing of tax returns "impl[ies] carelessness").

[13] The dissent discerns in *Lujan* v. *National Wildlife Federation*, 497 U. S. 871 (1990), an indication that the factors relevant to this inquiry extend no further than the movant's culpability and the reason for the delay, see *post*, at 401. We cannot agree. *Lujan* held that a District Court did not abuse its discretion in declining to permit a late filing under Rule 6(b) of the Civil Rules on grounds of excusable neglect. 497 U. S., at 897–898. The Court did not, however, define "excusable neglect" or even decide whether that standard could have been met on the facts of that case.

[14] The dissent would permit judges to take account of the full range of equitable considerations only if they have first made a threshold determination that the movant is "sufficiently blameless" in the delay, see *post*, at 400. The dissent believes that this formulation of the Rule's requirements

There is one aspect of the Court of Appeals' analysis, however, with which we disagree. The Court of Appeals suggested that it would be inappropriate to penalize respondents for the omissions of their attorney, reasoning that "the ultimate responsibility of filing the . . . proof[s] of clai[m] rested with [respondents'] counsel." *Ibid.* The court also appeared to focus its analysis on whether respondents did all they reasonably could in policing the conduct of their attorney, rather than on whether their attorney, as respondents' agent, did all he reasonably could to comply with the court-ordered bar date. In this, the court erred.

In other contexts, we have held that clients must be held accountable for the acts and omissions of their attorneys. In *Link* v. *Wabash R. Co.*, 370 U. S. 626 (1962), we held that a client may be made to suffer the consequence of dismissal of its lawsuit because of its attorney's failure to attend a scheduled pretrial conference. In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." *Id.*, at 633. To the contrary, the Court wrote:

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would bring needed clarity to the Rule's application and save judicial resources. See *post*, at 408. But narrowing the range of factors to be considered in making the "excusable neglect" determination will not eliminate disputes over how the remaining factors should be applied in any given case. For purposes of the present case at least, the dissent appears willing to draw a line between ordinary negligence and partial "indifference" to deadlines, see *post*, at 407, but parties with valuable interests at stake will no doubt find this distinction susceptible of litigation. The only reliable means of eliminating the "indeterminacy" the dissent finds so troubling would be to adopt a bright-line rule of the sort embraced by some Courts of Appeals, erecting a rigid barrier against late filings attributable in any degree to the movant's negligence. As we have suggested, however, such a construction is irreconcilable with our cases assigning a more flexible meaning to "excusable *neglect.*" Faced with a choice between our own precedent and Black's Law Dictionary, we adhere to the former.

> "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.*, at 633–634 (quoting *Smith* v. *Ayer*, 101 U. S. 320, 326 (1880)).

This principle also underlies our decision in *United States* v. *Boyle*, 469 U. S. 241 (1985), that a client could be penalized for counsel's tardy filing of a tax return. This principle applies with equal force here and requires that respondents be held accountable for the acts and omissions of their chosen counsel. Consequently, in determining whether respondents' failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable.

III

Although the Court of Appeals in this case erred in not attributing to respondents the fault of their counsel, we conclude that its result was correct nonetheless. First, petitioner does not challenge the findings made below concerning the respondents' good faith and the absence of any danger of prejudice to the debtor or of disruption to efficient judicial administration posed by the late filings. Nor would we be inclined in any event to unsettle factual findings entered by a Bankruptcy Court and affirmed by both the District Court and Court of Appeals. See *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 665 (1987). Indeed, in this case, the Bankruptcy Court took judicial notice of the fact that the debtor's second amended plan of reorganization, offered after this litigation was well underway, takes account of respondents' claims. App. 168a–169a. As the Court of Appeals found, the lack of any prejudice to the debtor or to the interests of efficient judicial administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim.

In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice at the time of the bar date. We do, however, consider significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases. As the Court of Appeals noted, ordinarily the bar date in a bankruptcy case should be prominently announced and accompanied by an explanation of its significance. See 943 F. 2d, at 678. We agree with the court that the "peculiar and inconspicuous placement of the bar date in a notice regarding a creditors['] meeting," without any indication of the significance of the bar date, left a "dramatic ambiguity" in the notification. *Ibid.*[15] This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be "excusable." In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, "excusable."

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[15] Indeed, one commentator has warned expressly of the deficiency in the method of notification employed by the Bankruptcy Court here: "Prior to the adoption of the present bankruptcy rules some bankruptcy courts placed a time to close the receipt of claims in chapter 11 in the notice sent to the listed creditors for the first meeting of creditors. This practice should be strongly discouraged. It conflicts with some of the factual circumstances giving rise to a claim in chapter 11 and can ambush unwitting creditors. Since creditors are notorious for failing to read all of the boilerplate language in the xeroxed form distributed as the notice of the first meeting of creditors, counsel for creditors will be wise to double check and ask for a prompt receipt of the notice from the client or examine the notice on file in the particular bankruptcy case." R. Aaron, Bankruptcy Law Fundamentals §8.02[7], p. 8–21 (rev. ed. 1991).

For these reasons, the judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS join, dissenting.

Today the Court replaces the straightforward analysis commended by the language of Bankruptcy Rule 9006(b)(1) with a balancing test. Because the Court's approach is inconsistent with the Rule's plain language and unduly complicates the task of courts called upon to apply it, I respectfully dissent.

I

Bankruptcy Rule 9006(b)(1) provides that, if a party moves for permission to act after having missed a deadline, the court "may at any time in its discretion . . . permit the act to be done where the failure to act was the result of excusable neglect." This language establishes two requirements that must be met before untimely action will be permitted. First, no relief is available unless the failure to comply with the deadline "was the result of excusable neglect." Bkrtcy. Rule 9006(b)(1). Second, the court may withhold relief if it believes forbearance inappropriate; the statute does not *require* the court to forgive every omission caused by excusable neglect, but states that the court "*may*" grant relief "in its discretion." *Ibid.* (emphasis added). Thus, the court must at the threshold determine its authority to allow untimely action by asking whether the failure to meet the deadline resulted from excusable neglect; if the answer is yes, *then* the court should consider the equities and decide whether to excuse the error.

Instead of following the plain meaning of the Rule and examining this case in these two steps, the Court employs a multifactor balancing test covering numerous equitable considerations, including (and perhaps not limited to) "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, . . . and whether the movant acted in good faith." *Ante*, at 395. But Rule 9006(b) does not simply command courts to permit late filing whenever it would be "equitable" in light of all the circumstances. Rather, it establishes that the courts may exercise their discretion in accord with the equities *only* if the failure to meet the deadline resulted from excusable neglect in the first place. Whether the failure resulted from excusable neglect depends on the nature of the omission itself, both in terms of cause and culpability. Consequently, until the reason for the omission is determined to be sufficiently blameless, the consequences of the failure, such as the effect on the parties or the impact on the judicial system, are not relevant. *In re Vertientes, Ltd.*, 845 F. 2d 57, 60 (CA3 1988) ("The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason"); *In re South Atlantic Financial Corp.*, 767 F. 2d 814, 819 (CA11 1985) (The focus of the Rule is on the omission and the reasons therefor rather than on the effect on others), cert. denied, 475 U. S. 1015 (1986); see also *Maressa* v. *A. H. Robins Co.*, 839 F. 2d 220, 221 (CA4 1988) (no exception to claim filing deadlines based on general equitable principles).

Although the Court pays lipservice to the existence of a threshold determination regarding excusable neglect, see *ante*, at 382 ("Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect'"), it holds that the threshold question is "at bottom an equitable one." *Ante*, at 395. Our case law is to the contrary.

In *Lujan* v. *National Wildlife Federation*, 497 U. S. 871 (1990), we applied the virtually identical language of Federal Rule of Civil Procedure 6(b). Under that Rule, as under this one, a court may not permit untimely filing unless it "find[s] as a substantive matter . . . that the failure to file on time 'was the result of excusable neglect.'" 497 U. S., at 897. Characterizing that "obstacle" as "the greatest of all," *ibid.*, we examined the reasons for the movant's failure to make a timely filing. Nowhere in our discussion did we mention the equities or the consequences of the movant's failure to file. Instead, we concentrated exclusively on the asserted cause of the failure and the movant's culpability. See *ibid.*

The Court concedes that Federal Rule of Civil Procedure 6(b) and Bankruptcy Rule 9006(b) have virtually identical language; indeed, it even relies on the former to support its interpretation of the latter. *Ante*, at 391–392. Yet the majority provides no reason why we should depart from the analysis we so recently employed in *Lujan*, except to say it reads that case differently. See *ante*, at 395, n. 13. While it is true that we did not "define" the phrase "excusable neglect" in *Lujan*, *ante*, at 395, n. 13, there is no denying that we applied that phrase to the facts before us: There is simply no other explanation for the opinion's discussion of whether the movant had overcome that "greatest" of "substantive obstacle[s]," 497 U. S., at 897. But even if *Lujan* might be read differently, the majority offers no affirmative reason to believe that the equities *should* bear on whether neglect is "excusable." Instead it states:

> "Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Ante*, at 395.

In my view, Congress *has* provided "guideposts" as to how courts should determine whether "neglect will be considered 'excusable.'" The majority simply fails to follow them.

First is the remaining language of Rule 9006(b)(1) itself, a good portion of which the majority fails to consult. The Rule, read in its entirety, establishes that the excusable neglect determination requires inquiry into causation rather than consequences: Unless "the *failure* to act was *the result*" of the excusable neglect, relief is unavailable. "It is clear from this language that the focus of [the Rule] is on the movant's actions and the reasons for those actions, not on the effect that an extension might have on the other parties' positions." *In re South Atlantic Financial Corp., supra,* at 819. Moreover, Rule 9006(b)(1) indicates that the court must determine whether the neglect was "excusable" as of the moment it occurred rather than in light of facts known when untimely action is proposed. The Rule authorizes relief in cases where the failure "*was*" the result of excusable neglect, not as to incidents where the neglect *is* excusable in light of current knowledge.

The majority also overlooks a second and dispositive guidepost—the accepted dictionary definition of "excusable neglect." That definition does not incorporate the results or consequences of a failure to take appropriate and timely action; to the contrary, it turns on the cause or reasons for the failure and the culpability involved. According to Black's Law Dictionary 566 (6th ed. 1990), "excusable neglect" is:

> "[A] failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party. As used in rule (*e. g.* Fed. R. Civil P. 6(b)) authorizing court to permit an act to be done after expiration of the time within which under the rules such act was required to be done, where failure to act was the result of 'excusable neglect', quoted phrase is ordinarily

> understood to be the act of a reasonably prudent person under the same circumstances."

Cf. 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, pp. 480, 482 (2d ed. 1987) ("Excusable neglect [in Fed. Rule Civ. Proc. 6(b)] seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance . . . . Absent a showing along these lines, relief will be denied"). Of course, we are not bound to accept Black's Law Dictionary as the authoritative expositor of American law. But if Congress had intended to depart from the accepted meaning of excusable neglect—supplementing its exclusive focus on the *reason* for the error with an emphasis on its *effect*—surely it would have so indicated.

In any event, it is quite unnatural to read the term "excusable neglect" to mean a variety of neglect that, in light of subsequent events and all the equities, turns out to be excusable. Not only does such an interpretation suffer from circularity—excusable neglect becomes the neglect that the court in its equitable discretion chooses to excuse—but it also renders critical language in the Rule superfluous. After all, the majority's interpretation would be no different if Rule 9006(b) afforded courts discretion to give relief in cases of "neglect" rather than "excusable neglect." The term "neglect" would describe the acceptable level of culpability, see *ante*, at 387–395, and the equities still would move the court's discretionary decision on whether it in fact would excuse the error once "neglect" was shown. The Court's interpretation thus reads the word "excusable" right out of the Rule. In my view, Congress included the word "excusable" to convey the notion that some types of neglect—at a minimum, the highly culpable and the willful—cannot be forgiven, regardless of the consequences.

The Court does recognize one guidepost. It states that the requirement of "excusable neglect" should be construed so as to "deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1)." *Ante,* at 395. But rather than concentrating on the types of culpable neglect that ought to be deterred, the majority immediately shifts its focus to considerations such as the *effect* of the failure to take timely action, including prejudice to the debtor and the effect on judicial proceedings. *Ibid.* If the goal of requiring neglect to be "excusable" is to deter culpable noncompliance, the consequences of such noncompliance should be irrelevant. To hold otherwise not only undermines deterrence but excuses the inexcusable.

II

The Court's approach also undermines the interests the Bankruptcy Rules seek to promote. Because the majority's balancing test is indeterminate, its results frequently will be called into question. Reasonable minds often differ greatly on what the equities require. This case is a prime example. Applying much the same test the Court applies today, two courts below held that respondents' neglect was inexcusable. Then the Court of Appeals substituted its view and held otherwise. Today the Court evens the score at two to two. We ought not unnecessarily introduce so much uncertainty into a routine matter like an "excusable neglect" determination. Nor should we unhesitatingly endorse an approach that invites litigants to seek redetermination of their procedural disputes from four different courts.

Direct application of Rule 9006(b)(1)'s plain language to this case, in contrast, is straightforward. First, we must examine the failure to act itself and ask if it resulted from excusable neglect. If it did, then the lower court may, in its discretion, permit untimely action in accord with the equities. But if the failure did not result from excusable neglect, there is no reason to consider the effects of the failure.

That, of course, brings us to the question to which the majority devotes the bulk of its discussion: whether mere negligence can qualify as excusable neglect. *Ante*, at 387–395. As the majority points out, *ante*, at 387, the Courts of Appeals have disagreed on this matter. Some require the omission to result from circumstances beyond counsel's reasonable control. See, *e. g., In re South Atlantic Financial Corp.*, 767 F. 2d, at 819, and cases cited *ante*, at 387, n. 3. Others hold that negligence may constitute excusable neglect but distinguish among different types of negligence. Cf. *Consolidated Freightways Corp. of Delaware* v. *Larson*, 827 F. 2d 916, 919 (CA3 1987) ("Excusable neglect" inquiry entails a "qualitative distinction between inadvertence which occurs despite counsel's affirmative efforts to comply and inadvertence which results from counsel's lack of diligence") (Fed. Rule App. Proc. 4(a)), cert. denied *sub nom. Consolidated Freightways Corp. of Delaware* v. *Secretary of Transp. of Pennsylvania*, 484 U. S. 1032 (1988). In my view, we need not resolve that dispute in this case. Once we properly clarify the factors that are *relevant* to the excusable neglect determination, the Bankruptcy Court's findings compel the conclusion that respondents' neglect was inexcusable under any standard.

The Bankruptcy Court expressly found that respondents' former counsel's failure to file a timely proof of claim resulted from negligence and, to some degree, an attitude of "indifference" toward the deadline. App. 172a. In addition, the court noted that the client, a sophisticated business person and an active participant in the bankruptcy proceedings, had received actual notice of, and was aware of, the deadline. *Id.*, at 171a. Thus, this is not a case of a clerical or other minor error yielding an untoward result despite counsel's best efforts; it is a case in which counsel simply failed to look after his business properly, even if that failure was not the result of bad faith.

The Court of Appeals held the neglect excusable nonetheless for two reasons. First, it thought it inequitable to saddle the client with the mistakes of its attorney. The Court today properly rejects that rationale. *Ante,* at 396–397. The second reason offered by the Court of Appeals was that the notice containing the deadline was incorporated in a document entitled "Notice for Meeting of Creditors." That designation, the court explained, was not enough to put those without extensive bankruptcy experience on notice that the "bar date" at the end of the notice was the final date for filing proofs of claims. *In re Pioneer Investment Services Co.,* 943 F. 2d 673, 678 (CA6 1991). In addition, the court noted that use of the term "bar date" to designate the deadline for filing a proof of claim was "dramatic[ally] ambigu[ous]" since there are many bar dates in bankruptcy, not all of them for the filing of proofs of claims. *Ibid.* The Court today signals its agreement. *Ante,* at 398, and n. 15. The majority and the Court of Appeals may be correct that the form of notice was unorthodox; they also may be correct in asserting that, if the inadequacy of notice caused respondents to miss the deadline, respondents' failure was the result of "excusable neglect." But they are not correct in asserting that respondents' former lawyer overlooked the deadline "as a result of" the unorthodox form of notice. The Bankruptcy Court made no such finding. Nor did it find that the notice's ambiguity somehow led counsel astray. On the contrary, the Bankruptcy Court found that both counsel and client had actual notice of the deadline and that the cause of their failure to file on time was indifference and negligence. App. 172a.

To be sure, we would not be obligated to accept those findings if they were not supported by the record. But they are supported by the record. Indeed, in a commendable display of candor, respondents' former counsel admitted that the "foul-up" was "particularly" his own. *Id.,* at 72a. Accord, *id.,* at 112a ("[T]he foul-up I can't lay to the clients' shoes because it really is probably mine"). There is no indication that he blamed his error on petitioner's form of notice. Rather, he appealed to the Bankruptcy Court's sense of fairness, arguing that it would be inequitable to penalize his client so greatly where the "delay was occasioned not by [the client], but by its counsel." *Id.*, at 73a. Accord, *id.*, at 102(a) ("[U]nder all the circumstances, we think it would be unfair and inequitable to visit the sins of the lawyer on the client"); *id.*, at 112a (Although the foul-up was respondents' attorney's, given "the lack of prejudice [and] the totality of all the circumstances, [it would be] inherently inequitable to visit the sins on the client for this situation").

Perhaps it would have been desirable for the Bankruptcy Court to make a specific factual finding on whether the unorthodox form of notice actually caused respondents' former counsel to miss the deadline. Given that respondents' lawyer offered no reason why he overlooked the bar date, it is not inconceivable that the notice's unorthodoxy led him astray. *Id.*, at 57a (no recollection of seeing the order setting the deadline); *id.*, at 103a (same). But if there is uncertainty, the answer is to remand to the Bankruptcy Court for appropriate factual findings. Based on the current state of the record and the findings the Bankruptcy Court did make, I cannot accept the majority's finding that counsel's failure in fact resulted from the inadequacy of notice.

Respondents' former counsel's error may represent a relatively unaggravated instance of negligence. He did not miss deadlines repeatedly despite clear warnings. Nor did he act in bad faith. But respondents, their former lawyer, the Court of Appeals, and the majority today have all failed to produce a reasonable explanation for this rather major error. More important still, the Bankruptcy Court *did* explain the error. It found that respondents' failure to meet the deadline resulted at least in part from counsel's "indifference." The majority offers no reason for ignoring that finding. Even accepting the conclusion that excusable neglect may cover some instances of negligence, indifference falls outside the range of the "excusable." Because the failure to act in this case did not result from excusable neglect, there is no occasion to consider whether the Bankruptcy Court properly exercised its discretion in light of the equities; respondents were ineligible for relief in any event.

The Court's only response is that, even if one focuses exclusively on the nature of the error and why it occurred, the parties can still litigate the Rule's application. *Ante*, at 395–396, n. 14. But that objection can be made to any approach; courts always must apply law to facts. The point is that following the plain language of Rule 9006(b)(1) renders the law's application both easier and more certain. A determination that a party missed the filing deadline on account of "indifference" or some other reason is not as "susceptible of litigation," *ibid.*, as the result of multifactor balancing. The determination is factual and, as such, may be overturned on review only if clearly erroneous. In fact, no one—neither the parties nor any of the many courts that have reviewed this case—has suggested that there was clear error here. Rather, in this case, as in most others like it, the Bankruptcy Court's findings are more than adequately supported by the record.

Indeed, the majority succeeds in circumventing the finding of "indifference" only by ignoring it, concentrating instead on other considerations in the multifactor test. The Court's technique will no doubt prove instructive to anyone appealing an excusable neglect determination in the future, for it highlights the indeterminacy of the test: A simple shift in focus from one factor to another—here, from cause to effects—shifts the balance and the result. The approach required by the Rule itself, in contrast, precludes that slippery tactic. At the threshold, there is but one question on which to focus: the reason the deadline was missed. Contrary to the Court's assertion, *ibid.*, that singular focus does not require us to hold today that all incidents of negligence are inexcusable. We need hold only that *indifference* is inexcusable. That, I would have thought, goes without saying.

III

When courts depart from the language of a congressional command, they often create unintended difficulties in the process. This case, I fear, may prove no exception. The majority's single-step, multifactor, equitable balancing approach to "excusable neglect" is contrary to the language of Rule 9006(b) and inconsistent with sensible notions of judicial economy. Its indeterminacy not only renders consistent application unlikely but also invites unproductive recourse to appeal. Such consequences are especially unfortunate in the Rules of *Bankruptcy* Procedure. An entity in bankruptcy can ill afford to waste resources on litigation; every dollar spent on lawyers is a dollar creditors will never see. Congress established in Rule 9006(b) the inquiry that should be made when courts contemplate permitting untimely action. Under the approach commended by that Rule, respondents are barred from filing an untimely proof of claim because its omission resulted from a neglect that, on this record, was simply inexcusable; the equities, no matter how compelling, cannot propel respondents over that hurdle. I therefore respectfully dissent.

CITY OF CINCINNATI *v.* DISCOVERY NETWORK, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91–1200. Argued November 9, 1992—Decided March 24, 1993

In 1989, petitioner city authorized respondent companies to place 62 freestanding newsracks on public property for the purpose of distributing free magazines that consisted primarily of advertisements for respondents' services. In 1990, motivated by its interest in the safety and attractive appearance of its streets and sidewalks, the city revoked respondents' permits on the ground that the magazines were "commercial handbill[s]," whose distribution on public property was prohibited by a pre-existing ordinance. In respondents' ensuing lawsuit, the District Court concluded that this categorical ban violated the First Amendment under the "reasonable fit" standard applied to the regulation of commercial speech in *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469. The Court of Appeals affirmed.

Held: The city's selective and categorical ban on the distribution, via newsrack, of "commercial handbills" is not consistent with the dictates of the First Amendment. Pp. 416–431.

(a) The record amply supports the conclusion that the city has not met its burden of establishing a "reasonable fit" between its legitimate interests in safety and esthetics and the means it chose to serve those interests. The ordinance's outdated prohibition of handbill distribution was enacted long before any concern about newsracks developed, for the apparent purpose of preventing the kind of visual blight caused by littering, rather than any harm associated with permanent, freestanding dispensing devices. The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition. See *Fox*, 492 U. S., at 480. The lower courts correctly ruled that the benefit to be derived from the removal of 62 newsracks out of a total of 1,500–2,000 on public property was small. Pp. 416–418.

(b) The Court rejects the city's argument that, because every decrease in the overall number of newsracks on its sidewalks necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape, there is a close fit between its ban on newsracks dispensing "commercial handbills" and its interests in safety and esthetics. This argument is premised upon the distinction the city has drawn between commercial speech such as respondents', which is viewed as having only a low value, and the assertedly more valuable noncommercial speech of "newspapers," whose distribution on public land is specifically authorized by separate provisions of the city code. The argument attaches more importance to that distinction than the Court's cases warrant and seriously underestimates the value of commercial speech. Moreover, because commercial and noncommercial publications are equally responsible for the safety concerns and visual blight that motivated the city, the distinction bears no relationship *whatsoever* to the admittedly legitimate interests asserted by the city and is an impermissible means of responding to those interests. Thus, on this record, the city has failed to make a showing that would justify its differential treatment of the two types of newsracks. Pp. 418–428.

(c) Because the city's regulation of newsracks is predicated on the difference in content between ordinary newspapers and commercial speech, it is not content neutral and cannot qualify as a valid time, place, or manner restriction on protected speech. See, *e. g., Ward* v. *Rock Against Racism,* 491 U. S. 781, 791. Pp. 428–431.

946 F. 2d 464, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 431. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and THOMAS, JJ., joined, *post,* p. 438.

Mark S. Yurick argued the cause for petitioner. With him on the briefs was *Fay D. Dupuis.*

Marc D. Mezibov argued the cause for respondents. With him on the brief was *Martha K. Landesberg.**

**Richard Ruda, Michael G. Dzialo,* and *Peter Buscemi* filed a brief for the U. S. Conference of Mayors et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Advertising Federation et al. by *Richard E. Wiley, Lawrence W. Secrest III, Howard H. Bell, John F. Kamp, David S. Versfelt, Robert J. Levering,* and *Valerie Schulte;* for the Association of National Advertisers, Inc., et al. by *Burt Neuborne, Gilbert H. Weil, Randolph Z. Volkell, John F. Kamp, David Versfelt, Jan S. Amundson, Quentin Riegel,* and *Edward Dunkelberger;* for the Institute for Justice by *William H. Mellor III* and *Clint Bolick;* for the Learning Resources Network by *Bruce R.*

JUSTICE STEVENS delivered the opinion of the Court.

Motivated by its interest in the safety and attractive appearance of its streets and sidewalks, the city of Cincinnati has refused to allow respondents to distribute their commercial publications through freestanding newsracks located on public property. The question presented is whether this refusal is consistent with the First Amendment.[1] In agreement with the District Court and the Court of Appeals, we hold that it is not.

I

Respondent Discovery Network, Inc., is engaged in the business of providing adult educational, recreational, and social programs to individuals in the Cincinnati area. It advertises those programs in a free magazine that it publishes nine times a year. Although these magazines consist primarily of promotional material pertaining to Discovery's courses, they also include some information about current events of general interest. Approximately one-third of these magazines are distributed through the 38 newsracks that the city authorized Discovery to place on public property in 1989.

Respondent Harmon Publishing Company, Inc., publishes and distributes a free magazine that advertises real estate for sale at various locations throughout the United States. The magazine contains listings and photographs of available

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Stewart; and for the Washington Legal Foundation by *Charles Fried, Richard Willard, Daniel J. Popeo,* and *Richard A. Samp.*

Briefs of *amici curiae* were filed for the City of New York by *O. Peter Sherwood, Leonard Koerner,* and *Paul T. Rephen;* and for the American Newspaper Publishers Association et al. by *P. Cameron DeVore, Marshall J. Nelson, John F. Sturm, René Milam, Harold W. Fuson, Jr., David M. Olive, Richard J. Tofel, Barbara W. Wall,* and *Peter Stone.*

[1] The First Amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Due Process Clause of the Fourteenth Amendment has been construed to make this prohibition applicable to state action. See, *e. g., Stromberg* v. *California,* 283 U. S. 359 (1931); *Lovell* v. *Griffin,* 303 U. S. 444 (1938).

residential properties in the greater Cincinnati area, and also includes some information about interest rates, market trends, and other real estate matters. In 1989, Harmon received the city's permission to install 24 newsracks at approved locations. About 15% of its distribution in the Cincinnati area is through those devices.

In March 1990, the city's Director of Public Works notified each of the respondents that its permit to use dispensing devices on public property was revoked, and ordered the newsracks removed within 30 days. Each notice explained that respondent's publication was a "commercial handbill" within the meaning of § 714–1–C of the Municipal Code[2] and therefore § 714–23 of the code[3] prohibited its distribution on public property. Respondents were granted administrative hearings and review by the Sidewalk Appeals Committee. Although the Committee did not modify the city's position, it agreed to allow the dispensing devices to remain in place pending a judicial determination of the constitutionality of its prohibition. Respondents then commenced this litigation in the United States District Court for the Southern District of Ohio.

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[2] That section provides:

"'Commercial Handbill' shall mean any printed or written matter, dodger, circular, leaflet, pamphlet, paper, booklet or any other printed or otherwise reproduced original or copies of any matter of literature:

"(a) Which advertises for sale any merchandise, product, commodity or thing; or

"(b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or

"(c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit." Cincinnati Municipal Code § 714-1-C (1992).

[3] That section provides:

"No person shall throw or deposit any commercial or non-commercial handbill in or upon any sidewalk, street or other public place within the city. Nor shall any person hand out or distribute or sell any commercial handbill in any public place. Provided, however, that it shall not be unlawful on any sidewalk, street or other public place within the city for any person to hand out or distribute, without charge to the receiver thereof, any non-commercial handbill to any person willing to accept it, except within or around the city hall building." § 714–23.

After an evidentiary hearing the District Court concluded that "the regulatory scheme advanced by the City of Cincinnati completely prohibiting the distribution of commercial handbills on the public right of way violates the First Amendment."[4] The court found that both publications were "commercial speech" entitled to First Amendment protection because they concerned lawful activity and were not misleading. While it recognized that a city "may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and esthetics on or about the public right of way,"[5] the District Court held, relying on *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469 (1989), that the city had the burden of establishing "a reasonable 'fit' between the legislature's ends and the means chosen to accomplish those ends." App. to Pet. for Cert. 23a. (quoting *Fox*, 492 U. S., at 480). It explained that the "fit" in this case was unreasonable because the number of newsracks dispensing commercial handbills was "minute" compared with the total number (1,500–2,000) on the public right of way, and because they affected public safety in only a minimal way. Moreover, the practices in other communities indicated that the city's safety and esthetic interests could be adequately protected "by regulating the size, shape, number or placement of such devices." App. to Pet. for Cert. 24a.[6]

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[4] App. to Pet. for Cert. 25a.

[5] *Id.*, at 23a.

[6] "Such regulation," the District Court noted, "allows [a] city to control the visual effect of the devices and to keep them from interfering with public safety without completely prohibiting the speech in question." *Id.*, at 24a.

On appeal, the city argued that since a number of courts had held that a complete ban on the use of newsracks dispensing traditional newspapers would be unconstitutional,[7] and that the "Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 563 (1980), its preferential treatment of newspapers over commercial publications was a permissible method of serving its legitimate interest in ensuring safe streets and regulating visual blight.[8] The Court of Appeals disagreed, holding that the lesser status of commercial speech is relevant only when its regulation was designed either to prevent false or misleading advertising, or to alleviate distinctive adverse effects of the specific speech at issue. Because Cincinnati sought to regulate only the "manner" in which respondents' publications were distributed, as opposed to their content or any harm caused by their content, the court reasoned that respondents' publications had "high value" for purposes of the *Fox* "reasonable fit" test. 946 F. 2d 464, 471 (CA6 1991) (italics omitted). Applying that test, the Court of Appeals agreed with the District Court that the burden placed on speech "cannot be justified by the paltry gains in safety and beauty achieved by the ordinance." *Ibid.*[9] The importance of the Court of

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[7] See *Sentinel Communications Co.* v. *Watts*, 936 F. 2d 1189, 1196–1197 (CA11 1991), and cases cited therein.

[8] In the words of the Court of Appeals:

"This 'lesser protection' afforded commercial speech is crucial to Cincinnati's argument on appeal. Cincinnati argues that placing the entire burden of achieving its goal of safer streets and a more harmonious landscape on commercial speech is justified by this lesser protection." 946 F. 2d 464, 469 (CA6 1991). See also *id.*, at 471 ("The [city's] defense of that ordinance rests solely on the low value allegedly accorded to commercial speech in general").

[9] The Court of Appeals also noted that the general ban on the distribution of handbills had been on the books long before the newsrack problem arose. *Id.*, at 473.

Appeals decision, together with the dramatic growth in the use of newsracks throughout the country,[10] prompted our grant of certiorari. 503 U. S. 918 (1992).

II

There is no claim in this case that there is anything unlawful or misleading about the contents of respondents' publications. Moreover, respondents do not challenge their characterization as "commercial speech." Nor do respondents question the substantiality of the city's interest in safety and esthetics. It was, therefore, proper for the District Court and the Court of Appeals to judge the validity of the city's prohibition under the standards we set forth in *Central Hudson* and *Fox*.[11] It was the city's burden to establish a "reasonable fit" between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests.[12]

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[10] We are advised that almost half of the single copy sales of newspapers are now distributed through newsracks. See Brief for American Newspaper Publishers Association et al. as *Amici Curiae* 2.

[11] While the Court of Appeals ultimately applied the standards set forth in *Central Hudson* and *Fox*, its analysis at least suggested that those standards might not apply to the type of regulation at issue in this case. For if commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech. Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox*, we need not decide whether that policy should be subjected to more exacting review.

[12] As we stated in *Fox:*

"[W]hile we have insisted that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our

There is ample support in the record for the conclusion that the city did not "establish the reasonable fit we require." *Fox*, 492 U. S., at 480. The ordinance on which it relied was an outdated prohibition against the distribution of any commercial handbills on public property. It was enacted long before any concern about newsracks developed. Its apparent purpose was to prevent the kind of visual blight caused by littering, rather than any harm associated with permanent, freestanding dispensing devices. The fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it has not "carefully calculated" the costs and benefits associated with the burden on speech imposed by its prohibition.[13] The benefit to be de-

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decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. . . .

"Here we require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." 492 U. S., at 480 (internal quotation marks and citations omitted).

[13] We reject the city's argument that the lower courts' and our consideration of alternative, less drastic measures by which the city could effectuate its interests in safety and esthetics somehow violates *Fox*'s holding that regulations on commercial speech are not subject to "least-restrictive-means" analysis. To repeat, see n. 12, *supra*, while we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational-basis review. A regulation need not be "absolutely the least severe that will achieve the desired end," *Fox*, 492 U. S., at 480, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.

rived from the removal of 62 newsracks while about 1,500–2,000 remain in place was considered "minute" by the District Court and "paltry" by the Court of Appeals. We share their evaluation of the "fit" between the city's goal and its method of achieving it.

In seeking reversal, the city argues that it is wrong to focus attention on the relatively small number of newsracks affected by its prohibition, because the city's central concern is with the overall number of newsracks on its sidewalks, rather than with the unattractive appearance of a handful of dispensing devices. It contends, first, that a categorical prohibition on the use of newsracks to disseminate commercial messages burdens no more speech than is necessary to further its interest in limiting the number of newsracks; and, second, that the prohibition is a valid "time, place, and manner" regulation because it is content neutral and leaves open ample alternative channels of communication. We consider these arguments in turn.

III

The city argues that there is a close fit between its ban on newsracks dispensing "commercial handbills" and its interests in safety and esthetics because every decrease in the number of such dispensing devices necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape. In the city's view, the prohibition is thus *entirely* related to its legitimate interests in safety and esthetics.

We accept the validity of the city's proposition, but consider it an insufficient justification for the discrimination against respondents' use of newsracks that are no more harmful than the permitted newsracks, and have only a minimal impact on the overall number of newsracks on the city's sidewalks. The major premise supporting the city's argument is the proposition that commercial speech has only a low value. Based on that premise, the city contends that the fact that assertedly more valuable publications are allowed to use newsracks does not undermine its judgment that its esthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public.

We cannot agree. In our view, the city's argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.

This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category. For respondents' publications share important characteristics with the publications that the city classifies as "newspapers." Particularly, they are "commercial handbills" within the meaning of § 714–1–C of the city's code because they contain advertising, a feature that apparently also places ordinary newspapers within the same category.[14] Separate provisions in the code specifically authorize the distribution of "newspapers" on the public right of way, but that term is not defined.[15] Presumably, respondents' publications do not qualify as newspapers because an examination of their content discloses a higher ratio of advertising to other text, such as news and feature stories, than is found in the exempted publications.[16] Indeed, Cincinnati's City

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[14] See n. 2, *supra.*

[15] Cincinnati Municipal Code § 862–1 (1992) provides:

"Permission is hereby granted to any person or persons lawfully authorized to engage in the business of selling newspapers to occupy space on the sidewalks of city streets for selling newspapers, either in the morning or afternoon, where permission has been obtained from the owner or tenant of the adjoining building."

[16] Some ordinary newspapers try to maintain a ratio of 70% advertising to 30% editorial content. See generally C. Fink, Strategic Newspaper Management 43 (1988).

Manager has determined that publications that qualify as newspapers and therefore *can* be distributed by newsrack are those that are published daily and/or weekly and "*primarily* presen[t] coverage of, and commentary on, current events." App. 230 (emphasis added).

The absence of a categorical definition of the difference between "newspapers" and "commercial handbills" in the city's code is also a characteristic of our opinions considering the constitutionality of regulations of commercial speech. Fifty years ago, we concluded that the distribution of a commercial handbill was unprotected by the First Amendment, even though half of its content consisted of political protest. *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942). A few years later, over Justice Black's dissent, we held that the "commercial feature" of door-to-door solicitation of magazine subscriptions was a sufficient reason for denying First Amendment protection to that activity. *Breard* v. *Alexandria,* 341 U. S. 622 (1951). Subsequent opinions, however, recognized that important commercial attributes of various forms of communication do not qualify their entitlement to constitutional protection. Thus, in *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748 (1976), we explained:

> "We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Buckley* v. *Valeo,* 424 U. S. 1, 35–59 (1976); *Pittsburgh Press Co.* v. *Human Relations Comm'n,* 413 U. S., at 384; *New York Times Co.* v. *Sullivan,* 376 U. S., at 266. Speech likewise is protected even though it is carried in a form that is 'sold' for profit, *Smith* v. *California,* 361 U. S. 147, 150 (1959) (books); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 501 (1952) (motion pictures); *Murdock* v.

> *Pennsylvania,* 319 U. S., at 111 (religious literature), and even though it may involve a solicitation to purchase or otherwise pay or contribute money. *New York Times Co.* v. *Sullivan, supra; NAACP* v. *Button,* 371 U. S. 415, 429 (1963); *Jamison* v. *Texas,* 318 U. S., at 417; *Cantwell* v. *Connecticut,* 310 U. S. 296, 306–307 (1940).
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> "If there is a kind of commercial speech that lacks all First Amendment protection, therefore it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection. *Bigelow* v. *Virginia,* 421 U. S., at 822; *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940)." *Id.,* at 761–762.

We then held that even speech that does no more than propose a commercial transaction is protected by the First Amendment. *Id.,* at 762.[17]

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[17] JUSTICE BLACKMUN, writing for the Court in *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977), summarized the reasons for extending First Amendment protection to "core" commercial speech:

"The listener's interest [in commercial speech] is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow* v. *Virginia,* 421 U. S. 809 (1975). And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC*

In later opinions we have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech—"that is, expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S., at 561. We did not, however, use that definition in either *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60 (1983), or in *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469 (1989).

In the *Bolger* case we held that a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives could not be applied to the appellee's promotional materials. Most of the appellee's mailings consisted primarily of price and quantity information, and thus fell "within the core notion of commercial speech—'speech which does "no more than propose a commercial transaction."'" *Bolger*, 463 U. S., at 66 (quoting *Virginia Pharmacy*, 425 U. S., at 762, in turn quoting *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 385 (1973)). Relying in part on the appellee's economic motivation, the Court also answered the "closer question" about the proper

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v. *Procter & Gamble Co.*, 386 U. S. 568, 603–604 (1967) (Harlan, J., concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Id.*, at 364.

Of course, we were not the first to recognize the value of commercial speech:

"'[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.'" D. Boorstin, The Americans: The Colonial Experience 328, 415 (1958), quoting I. Thomas, History of Printing in America with a Biography of Printers, and an Account of Newspapers (2d ed. 1810).

label for informational pamphlets that were concededly advertisements referring to a specific product, and concluded that they also were "commercial speech." 463 U. S., at 66–67. It is noteworthy that in reaching that conclusion we did not simply apply the broader definition of commercial speech advanced in *Central Hudson*—a definition that obviously would have encompassed the mailings—but rather "examined [them] carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." 463 U. S., at 66.[18] In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech." 492 U. S., at 473–474 (emphasis added).

Under the *Fox* test it is clear that much of the material in ordinary newspapers is commercial speech and, conversely, that the editorial content in respondents' promotional publications is not what we have described as "core" commercial speech. There is no doubt a "commonsense" basis for distinguishing between the two, but under both the city's code and our cases the difference is a matter of degree.[19]

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[18] When the Court first advanced the broader definition of commercial speech, a similar concern had been expressed. See *Central Hudson*, 447 U. S., at 579 (STEVENS, J., concurring in judgment).

[19] We note that because Cincinnati's regulatory scheme depends on a governmental determination as to whether a particular publication is a "commercial handbill" or a "newspaper," it raises some of the same concerns as the newsrack ordinance struck down in *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750 (1988). The ordinance at issue in *Lakewood* vested in the mayor authority to grant or deny a newspaper's application for a newsrack permit, but contained no explicit limit on the scope of the mayor's discretion. The Court struck down the ordinance, reasoning that a licensing scheme that vests such unbridled discretion in a government official may result in either content or viewpoint censorship. *Id.*, at 757, 769–770. Similarly, because the distinction between a "newspaper" and a "commercial handbill" is by no means clear—as noted above, the city deems a "newspaper" as a publication "*primarily* presenting coverage of, and commentary on, current events," App. 230 (emphasis added)—the responsibility for distinguishing between the two carries with

Nevertheless, for the purpose of deciding this case, we assume that all of the speech barred from Cincinnati's sidewalks is what we have labeled "core" commercial speech and that no such speech is found in publications that are allowed to use newsracks. We nonetheless agree with the Court of Appeals that Cincinnati's actions in this case run afoul of the First Amendment. Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted. It is therefore an impermissible means of responding to the city's admittedly legitimate interests. Cf. *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 120 (1991) (distinction drawn by Son of Sam law between income derived from criminal's descriptions of his crime and other sources "has nothing to do with" State's interest in transferring proceeds of crime from criminals to victims); *Carey* v. *Brown*, 447 U. S. 455, 465 (1980) (State's interest in residential privacy cannot sustain statute permitting labor picketing, but prohibiting nonlabor picket-

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it the potential for invidious discrimination of disfavored subjects. See also *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 536–537 (1981) (Brennan, J., concurring in judgment) (ordinance which permits governmental unit to determine, in the first instance, whether speech is commercial or noncommercial "entail[s] a substantial exercise of discretion by a city's official" and therefore "presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech"). Cf. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230 (1987) ("In order to determine whether a magazine is subject to sales tax, Arkansas' enforcement authorities must necessarily examine the content of the message that is conveyed . . . . Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press") (internal quotation marks and citation omitted).

ing when "nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy").[20]

The city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing "newspapers" or "commercial handbills," is equally unattractive. While there was some testimony in the District Court that commercial publications are distinct from noncommercial publications in their capacity to proliferate, the evidence of such was exceedingly weak, the Court of Appeals discounted it, 946 F. 2d, at 466–467, and n. 3, and Cincinnati does not reassert that particular argument in this Court. As we have explained, the city's primary concern, as argued to us, is with the aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault. In fact, the newspapers are arguably the greater culprit because of their superior number.

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[20] *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981), upon which the city heavily relies, is not to the contrary. In that case, a plurality of the Court found as a permissible restriction on commercial speech a city ordinance that, for the most part, banned outdoor "offsite" advertising billboards, but permitted "onsite" advertising signs identifying the owner of the premises and the goods sold or manufactured on the site. *Id.*, at 494, 503. Unlike this case, which involves discrimination between commercial and noncommercial speech, the "offsite-onsite" distinction involved disparate treatment of two types of commercial speech. Only the onsite signs served both the commercial and public interest in guiding potential visitors to their intended destinations; moreover, the plurality concluded that a "city may believe that offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising," *id.*, at 511–512. Neither of these bases has any application to the disparate treatment of newsracks in this case.

THE CHIEF JUSTICE is correct that seven Justices in the *Metromedia* case were of the view that San Diego could completely ban offsite commercial billboards for reasons unrelated to the content of those billboards. *Post*, at 444. Those seven Justices did not say, however, that San Diego could *distinguish* between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns. That question was not presented in *Metromedia*, for the regulation at issue in that case did not draw a distinction between commercial and noncommercial offsite billboards; with a few exceptions, it essentially banned *all* offsite billboards.

Cincinnati has not asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech. See, *e. g., Bolger,* 463 U. S., at 81 (STEVENS, J., concurring in judgment) ("[T]he commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character"); *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S., at 455–456 (commercial speech, unlike other varieties of speech, "occurs in an area traditionally subject to government regulation").[21]

A closer examination of one of the cases we have mentioned, *Bolger* v. *Youngs Drug Products,* demonstrates the fallacy of the city's argument that a reasonable fit is established by the mere fact that the entire burden imposed on commercial speech by its newsrack policy may in some small way limit the total number of newsracks on Cincinnati's sidewalks. Here, the city contends that safety concerns and visual blight may be addressed by a prohibition that distinguishes between commercial and noncommercial publications that are equally responsible for those problems. In *Bolger*, however, in rejecting the Government's reliance on its interest in protecting the public from "offensive" speech, "[we] specifically declined to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech." 463 U. S., at 71–72 (citing *Carey* v. *Population Services International*, 431 U. S. 678, 701, n. 28 (1977)). Moreover, the fact that the regulation "provide[d] only the most limited incremental support for the interest asserted," 463 U. S., at 73—that it achieved only a "marginal degree of protection," *ibid.*, for that interest—supported our holding that the prohibition was invalid. Finally, in *Bolger*, as in this case, the burden on commercial speech was imposed by denying the speaker access to one method of distribution—there the United States mails, and here the placement of newsracks on public property—without interfering with alternative means of access to the audience. As then-JUSTICE REHNQUIST explained in his separate opinion, that fact did not minimize the significance of the burden:

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[21] Moreover, the principal reason for drawing a distinction between commercial and noncommercial speech has little, if any, application to a regulation of their distribution practices. As we explained in *Bolger:* "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." 463 U. S., at 68. The interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in the same publications. On the other hand, the interest in protecting the free flow of information and ideas is still present when such expression is found in a commercial context.

> "[T]he Postal Service argues that Youngs can communicate with the public otherwise than through the mail. [This argument falls] wide of the mark. A prohibition on the use of the mails is a significant restriction of First Amendment rights. We have noted that '"[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues."' *Blount* v. *Rizzi*, 400 U. S., at 416, quoting *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 437 (1921) (Holmes, J., dissenting)." *Id.*, at 79–80 (footnote omitted).

In a similar vein, even if we assume, *arguendo*, that the city might entirely prohibit the use of newsracks on public property, as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech.

In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing. Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the "fit" between its goals and its chosen means that is required by our opinion in *Fox*. It remains to consider the city's argument that its prohibition is a permissible time, place, and manner regulation.

IV

The Court has held that government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified "'without reference to the content of the regulated speech.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989), quoting *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984). Thus, a prohibition against the use of sound trucks emitting "loud and raucous" noise in residential neighborhoods is permissible if it applies equally to music, political speech, and advertising. See generally *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). The city contends that its regulation of newsracks qualifies as such a restriction because the interests in safety and esthetics that it serves are entirely unrelated to the content of respondents' publications. Thus, the argument goes, the *justification* for the regulation is content neutral.

The argument is unpersuasive because the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech. True, there is no evidence that the city has acted with animus toward the ideas contained within respondents' publications, but just last Term we expressly rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.,* 502 U. S., at 117. Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute "commercial handbills," but not "newspapers." Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."

Nor are we persuaded that our statements that the test for whether a regulation is content based turns on the "justification" for the regulation, see, *e. g., Ward,* 491 U. S., at 791; *Clark,* 468 U. S., at 293, compel a different conclusion. We agree with the city that its desire to limit the total number of newsracks is "justified" by its interests in safety and esthetics. The city has not, however, limited the number of newsracks; it has limited (to zero) the number of newsracks *distributing commercial publications.* As we have explained, there is no justification for that particular regulation other than the city's naked assertion that commercial speech has "low value." It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral.

By the same reasoning, the city's heavy reliance on *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986), is misplaced. In *Renton,* a city ordinance imposed particular zoning regulations on movie theaters showing adult films. The Court recognized that the ordinance did not fall neatly into the "content-based" or "content-neutral" category in that "the ordinance treats theaters that specialize in adult films differently from other kinds of theaters." *Id.*, at 47. We upheld the regulation, however, largely because it was justified not by an interest in suppressing adult films, but by the city's concern for the "secondary effects" of such theaters on the surrounding neighborhoods. *Id.*, at 47–49. In contrast to the speech at issue in *Renton,* there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks.

In sum, the city's newsrack policy is neither content neutral nor, as demonstrated in Part III, *supra,* "narrowly tailored." Thus, regardless of whether or not it leaves open ample alternative channels of communication, it cannot be justified as a legitimate time, place, or manner restriction on protected speech.

Cincinnati has enacted a sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech. As did the District Court and the Court of Appeals, we conclude that Cincinnati has failed to justify that policy. The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests that Cincinnati has asserted are unrelated to any distinction between "commercial handbills" and "newspapers." Moreover, because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place, or manner restriction on protected speech.

For these reasons, Cincinnati's categorical ban on the distribution, via newsrack, of "commercial handbills" cannot be squared with the dictates of the First Amendment.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, concurring.

I agree that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), and *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469 (1989), and I therefore join the Court's opinion. I write separately because I continue to believe that the analysis set forth in *Central Hudson* and refined in *Fox* affords insufficient protection for truthful, noncoercive commercial speech concerning lawful activities. In *Central Hudson*, I expressed the view that "intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech," but not for a regulation that suppresses truthful commercial speech to serve some other government purpose. 447 U. S., at 573 (opinion concurring in judgment). The present case demonstrates that there is no reason to treat truthful commercial speech as a class that is less "valuable" than noncommercial speech. Respondents' publications, which respectively advertise the availability of residential properties and educational opportunities, are unquestionably "valuable" to those who choose to read them, and Cincinnati's ban on commercial newsracks should be subject to the same scrutiny we would apply to a regulation burdening noncommercial speech.

In *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), this Court held that commercial speech "which does 'no more than propose a commercial transaction'" is protected by the First Amendment, *id.*, at 762, quoting *Pittsburgh Press Co.* v. *Pittsburgh*

Comm'n on Human Relations, 413 U. S. 376, 385 (1973). In so holding, the Court focused principally on the First Amendment interests of the listener. The Court noted that "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate," 425 U. S., at 763, and that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered," *id.,* at 765. See also *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 364 (1977).

The Court recognized, however, that government may regulate commercial speech in ways that it may not regulate protected noncommercial speech. See generally *Virginia State Bd. of Pharmacy,* 425 U. S., at 770–772. Government may regulate commercial speech to ensure that it is not false, deceptive, or misleading, *id.,* at 771–772, and to ensure that it is not coercive, *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S. 447, 457 (1978). Government also may prohibit commercial speech proposing unlawful activities. *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U. S., at 388. See *Bates* v. *State Bar of Arizona,* 433 U. S., at 384.[1] To permit government regulation on these grounds is consistent with this Court's emphasis on the First Amendment interests of the listener in the commercial speech context. A listener has little interest in receiving false, misleading, or deceptive commercial information. See *id.,* at

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[1] In the context of noncommercial speech, by contrast, this Court has adopted rules that protect certain false statements of fact and speech advocating illegal activities. See, *e. g., New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279–280 (1964) (liability for false statements regarding public officials may not be imposed without a showing of "actual malice"); *Brandenburg* v. *Ohio,* 395 U. S. 444, 447 (1969) (government may not proscribe advocacy of illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

383 ("[T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability"). A listener also has little interest in being coerced into a purchasing decision. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 457 ("[I]n-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection"). Furthermore, to the extent it exists at all, a listener has only a weak interest in learning about commercial opportunities that the criminal law forbids. In sum, the commercial speech that this Court had permitted government to regulate or proscribe was commercial speech that did not "serv[e] individual and societal interests in assuring informed and reliable decisionmaking." *Bates* v. *State Bar of Arizona*, 433 U. S., at 364.

So the law stood in 1980 when this Court decided *Central Hudson* and held that *all* commercial speech was entitled only to an intermediate level of constitutional protection. The majority in *Central Hudson* reviewed the Court's earlier commercial speech cases and concluded that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U. S., at 563. As a descriptive matter, this statement was correct, since our cases had recognized that commercial speech could be regulated on grounds that protected noncommercial speech could not. See n. 1, *supra*. This "lesser protection" did not rest, however, on the fact that commercial speech "is of less constitutional moment than other forms of speech," as the *Central Hudson* majority asserted. 447 U. S., at 563, n. 5.[2] Rather, it reflected the fact that the listener's First Amendment interests, from which the protection of commercial speech largely derives, allow for certain *specific* kinds of government regulation that would not be permitted outside the context of commercial speech.

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[2] *Central Hudson*'s conclusion that commercial speech is less valuable than noncommercial speech seems to have its roots in an often-quoted passage from *Ohralik:* "[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expres-

The *Central Hudson* majority went on to develop a four-part analysis commensurate with the supposed intermediate status of commercial speech. Under that test, a court reviewing restrictions on commercial speech must first determine whether the speech concerns a lawful activity and is not misleading.[3] If the speech does not pass this preliminary threshold, then it is not protected by the First Amendment at all. *Id.*, at 566. If it does pass the preliminary threshold, then the government is required to show (1) that the asserted government interest is "substantial," (2) that the regulation at issue "directly advances" that interest, and (3) that the regulation "is not more extensive than is necessary to serve that interest." *Ibid.* The Court refined this test in *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S., at 480, to clarify that a regulation limiting commercial speech can, in fact, be more extensive than is necessary to serve the government's interest as long as it is not unreasonably so. This intermediate level of scrutiny is a far cry from strict scrutiny, under which the government interest must be "compelling" and the regulation "narrowly tailored" to serve that interest. See, *e. g.*, *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 657 (1990).

In *Central Hudson*, I concurred only in the Court's judgment because I felt the majority's four-part analysis was

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sion." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). As I explain in the text, however, the "limited measure of protection" our cases had afforded commercial speech reflected the fact that we had allowed "modes of regulation that might be impermissible in the realm of noncommercial expression" and not that we had relegated commercial speech to a "subordinate position in the scale of First Amendment values."

[3] *Central Hudson*'s reference to "misleading" speech appears to include speech that is inherently coercive, such as in-person solicitation. See 447 U. S., at 563, citing *Ohralik*, 436 U. S., at 464–465.

"not consistent with our prior cases and [did] not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." 447 U. S., at 573. I noted: "Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques." *Id.*, at 574. Under the analysis adopted by the *Central Hudson* majority, misleading and coercive commercial speech and commercial speech proposing illegal activities are addressed in the first prong of the four-part test. Yet commercial speech that survives the first prong—*i. e.*, that is not misleading or coercive and that concerns lawful activities—is entitled only to an intermediate level of protection. Furthermore, the "substantial" government interest that *Central Hudson* requires to justify restrictions on commercial speech does not have to be related to protecting against deception or coercion, for *Central Hudson* itself left open the possibility that the government's substantial interest in energy conservation might justify a more narrowly drawn restriction on truthful advertising that promotes energy consumption. See *id.*, at 569–572.

Thus, it is little wonder that when the city of Cincinnati wanted to remove some newsracks from its streets, it chose to eliminate all the *commercial* newsracks first although its reasons had nothing to do with either the deceptiveness of particular commercial publications or the particular characteristics of commercial newsracks themselves. First, Cincinnati could rely on this Court's broad statements that commercial speech "is of less constitutional moment than other forms of speech," *id.*, at 563, n. 5, and occupies a "subordinate position in the scale of First Amendment values," *Ohralik*, 436 U. S., at 456. Second, it knew that under *Central Hudson* its restrictions on commercial speech would be examined with less enthusiasm and with less exacting scrutiny than any restrictions it might impose on other speech. Indeed, it appears that Cincinnati felt it had *no choice* under this Court's decisions but to burden commercial newsracks more heavily. See Brief for Petitioner 28 ("Cincinnati . . . could run afoul of First Amendment protections afforded noncommercial speech by affording newsrack-type dispensers containing commercial speech like treatment with newsracks containing noncommercial speech").

In this case, *Central Hudson*'s chickens have come home to roost.

The Court wisely rejects Cincinnati's argument that it may single out commercial speech simply because it is "low value" speech, see *ante*, at 428, and on the facts of this case it is unnecessary to do more. The Court expressly reserves the question whether regulations not directed at the content of commercial speech or adverse effects stemming from that content should be evaluated under the standards applicable to regulations of fully protected speech. *Ante*, at 416, n. 11. I believe the Court should answer that question in the affirmative and hold that truthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection. As I wrote in *Central Hudson*, "intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech." 447 U. S., at 573.[4] But none of the "commonsense differences," *Virginia State Bd. of Pharmacy*, 425 U. S., at 771, n. 24, between commercial and other speech "justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech." *Central Hudson*, 447 U. S., at 578 (opinion concurring in judgment).

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[4] I made no mention in *Central Hudson* of commercial speech proposing illegal activities, but I do not quarrel with the proposition that government may suppress such speech altogether. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 388 (1973). See also *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 384 (1977).

The commercial publications at issue in this case illustrate the absurdity of treating all commercial speech as less valuable than all noncommercial speech. Respondent Harmon Publishing Company, Inc., publishes and distributes a free magazine containing listings and photographs of residential properties. Like the "For Sale" signs this Court, in *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85 (1977), held could not be banned, the information contained in Harmon's publication "bear[s] on one of the most important decisions [individuals] have a right to make: where to live and raise their families." *Id.,* at 96. Respondent Discovery Network, Inc., advertises the availability of adult educational, recreational, and social programs. Our cases have consistently recognized the importance of education to the professional and personal development of the individual. See, *e. g., Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954). The "value" of respondents' commercial speech, at least to those who receive it, certainly exceeds the value of the offensive, though political, slogan displayed on the petitioner's jacket in *Cohen* v. *California,* 403 U. S. 15 (1971).

I think it highly unlikely that according truthful, noncoercive commercial speech the full protection of the First Amendment will erode the level of that protection. See *post,* at 439 (dissenting opinion); *Ohralik* v. *Ohio State Bar Assn.,* 436 U. S., at 456. I have predicted that "the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech." See *R. A. V.* v. *St. Paul,* 505 U. S. 377, 415 (1992) (opinion concurring in judgment). Yet I do not believe that protecting truthful advertising will test this Nation's commitment to the First Amendment to any greater extent than protecting offensive political speech. See, *e. g., Texas* v. *Johnson,* 491 U. S. 397 (1989) (flag burning); *National Socialist Party of America* v. *Skokie,* 432 U. S. 43 (1977) (Nazi march through Jewish neighborhood); *Cohen* v. *California*, 403 U. S. 15 (1971) (profane antiwar slogan). The very fact that government remains free, in my view, to ensure that commercial speech is not deceptive or coercive, to prohibit commercial speech proposing illegal activities, and to impose reasonable time, place, or manner restrictions on commercial speech greatly reduces the risk that protecting truthful commercial speech will dilute the level of First Amendment protection for speech generally.

I am heartened by the Court's decision today to reject the extreme extension of *Central Hudson*'s logic, and I hope the Court ultimately will come to abandon *Central Hudson*'s analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE THOMAS join, dissenting.

Concerned about the safety and esthetics of its streets and sidewalks, the city of Cincinnati decided to do something about the proliferation of newsracks on its street corners. Pursuant to an existing ordinance prohibiting the distribution of "commercial handbills" on public property, the city ordered respondents Discovery Network, Inc., and Harmon Publishing Company, Inc., to remove their newsracks from its sidewalks within 30 days. Respondents publish and distribute free of charge magazines that consist principally of commercial speech. Together their publications account for 62 of the 1,500–2,000 newsracks that clutter Cincinnati's street corners. Because the city chose to address its newsrack problem by banning only those newsracks that disseminate commercial handbills, rather than regulating all newsracks (including those that disseminate traditional newspapers) alike, the Court holds that its actions violate the First Amendment to the Constitution. I believe this result is inconsistent with prior precedent.

"Our jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.'" *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469, 477 (1989) (quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978)); see also *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 64–65 (1983). We have advanced several reasons for this treatment, among which is that commercial speech is more durable than other types of speech, since it is "the offspring of economic self-interest." *Central Hudson Gas & Electric Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, 564, n. 6 (1980); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 772, n. 24 (1976). Commercial speech is also "less central to the interests of the First Amendment" than other types of speech, such as political expression. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 758, n. 5 (1985) (opinion of Powell, J.). Finally, there is an inherent danger that conferring equal status upon commercial speech will erode the First Amendment protection accorded noncommercial speech, "simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik, supra,* at 456.

In *Central Hudson,* we set forth the test for analyzing the permissibility of restrictions on commercial speech as follows:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation

> directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U. S., at 566.

I agree with the Court that the city's prohibition against respondents' newsracks is properly analyzed under *Central Hudson*, see *ante*, at 416, but differ as to the result this analysis should produce.

As the Court points out, "respondents do not challenge their characterization as 'commercial speech,'" and "[t]here is no claim in this case that there is anything unlawful or misleading about the contents of respondents' publications." *Ibid.* "Nor do respondents question the substantiality of the city's interest in safety and esthetics." *Ibid.* This case turns, then, on the application of the last part of the *Central Hudson* analysis. Although the Court does not say so, there can be no question that Cincinnati's prohibition against respondents' newsracks "directly advances" its safety and esthetic interests because, if enforced, the city's policy will decrease the number of newsracks on its street corners. This leaves the question whether the city's prohibition is "more extensive than necessary" to serve its interests, or, as we elaborated in *Fox*, whether there is a "reasonable fit" between the city's desired ends and the means it has chosen to accomplish those ends. See 492 U. S., at 480. Because the city's "commercial handbill" ordinance was not enacted specifically to address the problems caused by newsracks, and, if enforced, the city's prohibition against respondents' newsracks would result in the removal of only 62 newsracks from its street corners, the Court finds "ample support in the record for the conclusion that the city did not establish [a] reasonable fit." *Ante*, at 417 (internal quotation marks omitted). I disagree.

According to the Court, the city's decision to invoke an existing ordinance "to address its recently developed concern about newsracks" indicates that "it has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Ibid.* The implication being that, if Cincinnati had studied the problem in greater detail, it would have discovered that it could have accomplished its desired ends by regulating the "size, shape, appearance, or number" of all newsracks, rather than categorically banning only those newsracks that disseminate commercial speech. *Ibid.* Despite its protestations to the contrary, see *ante,* at 417, n. 13, this argument rests on the discredited notion that the availability of "less restrictive means" to accomplish the city's objectives renders its regulation of commercial speech unconstitutional. As we observed in *Fox,* "almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding far less restrictive and more precise means." 492 U. S., at 479 (internal quotation marks omitted). That there may be other—less restrictive—means by which Cincinnati could have gone about addressing its safety and esthetic concerns, then, does not render its prohibition against respondents' newsracks unconstitutional.

Nor does the fact that, if enforced, the city's prohibition would result in the removal of only 62 newsracks from its street corners. The Court attaches significance to the lower courts' findings that any benefit that would be derived from the removal of respondents' newsracks would be " 'minute' " or " 'paltry.' " *Ante,* at 418. The relevant inquiry, though, is not the degree to which the locality's interests are furthered in a particular case, but rather the relation that the challenged regulation of commercial speech bears to the "overall problem" the locality is seeking to alleviate. *Ward* v. *Rock Against Racism,* 491 U. S. 781, 801 (1989). This follows from our test for reviewing the validity of "time, place, or manner" restrictions on noncommercial speech, which we have said is "substantially similar" to the *Central Hudson* analysis. *Board of Trustees of State University of N. Y.* v. *Fox, supra,* at 477 (internal quotation marks omitted). Properly viewed, then, the city's prohibition against respondents' newsracks is directly related to its efforts to alleviate the problems caused by newsracks, since every newsrack that is removed from the city's sidewalks marginally enhances the safety of its streets and esthetics of its cityscape. This conclusion is not altered by the fact that the city has chosen to address its problem by banning only those newsracks that disseminate commercial speech, rather than regulating all newsracks alike.

Our commercial speech cases establish that localities may stop short of fully accomplishing their objectives without running afoul of the First Amendment. In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico,* 478 U. S. 328, 342 (1986), where we upheld Puerto Rico's ban on promotional advertising of casino gambling aimed at Puerto Rico residents, we rejected the appellant's argument that the ban was invalid under *Central Hudson* because other types of gambling (*e. g.,* horse racing) were permitted to be advertised to local residents. More to the point, in *Metromedia, Inc.* v. *San Diego,* 453 U. S. 490 (1981) (plurality opinion), where we upheld San Diego's ban of offsite billboard advertising, we rejected the appellants' argument that the ban was invalid under *Central Hudson* because it did not extend to onsite billboard advertising. See 453 U. S., at 511 ("[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising"). See also *City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U. S. 789, 810–811 (1984) (rejecting the argument that the city's prohibition against the posting of signs on public property could not be justified on esthetic grounds because it did not extend to the posting of signs on private property). Thus, the fact that Cincinnati's regulatory scheme is underinclusive does not render its ban on respondents' newsracks unconstitutional.

The Court offers an alternative rationale for invalidating the city's policy: viz., the distinction Cincinnati has drawn (between commercial and noncommercial speech) in deciding which newsracks to regulate "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Ante,* at 424 (emphasis in original). That is, because newsracks that disseminate noncommercial speech have the same physical characteristics as newsracks that disseminate commercial speech, and therefore undermine the city's safety and esthetic interests to the same degree, the city's decision to ban only those newsracks that disseminate commercial speech has nothing to do with its interests in regulating newsracks in the first place. The city does not contend otherwise; instead, it asserts that its policy is grounded in the distinction we have drawn between commercial and noncommercial speech. "In the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city," however, the Court refuses "to recognize Cincinnati's bare assertion that the 'low value' of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing 'commercial handbills.'" *Ante,* at 428.

Thus, despite the fact that we have consistently distinguished between commercial and noncommercial speech for the purpose of determining whether the regulation of speech is permissible, the Court holds that in attempting to alleviate its newsrack problem Cincinnati may not choose to proceed incrementally by burdening only commercial speech first. Based on the different levels of protection we have accorded commercial and noncommercial speech, we have previously said that localities may not favor commercial over noncommercial speech in addressing similar urban problems, see *Metromedia, Inc.* v. *San Diego, supra,* at 513 (plurality opinion), but before today we have never even suggested that the converse holds true. It is not surprising, then, that the Court offers little in the way of precedent supporting its new rule. The cases it does cite involve challenges to the restriction of noncommercial speech in which we have refused to accept distinctions drawn between restricted and nonrestricted speech on the ground that they bore no relationship to the interests asserted for regulating the speech in the first place. See *ante*, at 424–425, citing *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 120 (1991); *Carey* v. *Brown*, 447 U. S. 455, 465 (1980). Neither of these cases involved the regulation of commercial speech; nor did they involve a challenge to the permissibility of distinctions drawn between categories of speech that we have accorded different degrees of First Amendment protection.

The Court's reliance on *Bolger* v. *Youngs Drug Products Corp.*, see *ante*, at 426–428, is also misplaced. In that case we said that the Government's interest in "shield[ing] recipients of mail from materials that they are likely to find offensive" was invalid regardless of the type of speech—commercial or noncommercial—involved. See 463 U. S., at 71–72. By contrast, there can be no question here that the city's safety and esthetic interests justify its prohibition against respondents' newsracks. This at least is the teaching of *Metromedia*. There, seven Justices were of the view that San Diego's safety and esthetic interests were sufficient to justify its ban on offsite billboard advertising, even though the city's reason for regulating these billboards had nothing to do with the content of the advertisements they displayed. See 453 U. S., 507–510 (opinion of WHITE, J., joined by Stewart, Marshall, and Powell, JJ.); *id.*, at 552–553 (STEVENS, J., dissenting in part); *id.*, at 559–561, 563 (Burger, C. J., dissenting); *id.*, at 569–570 (REHNQUIST, J., dissenting). Without even attempting to reconcile *Metromedia*, the Court now suggests that commercial speech is only subject to lesser protection when it is being regulated because of its content (or adverse effects stemming therefrom). See *ante*, at 416, n. 11, 425–426, and n. 21. This holding, I fear, will unduly hamper our cities' efforts to come to grips with the unique problems posed by the dissemination of commercial speech.

If (as I am certain) Cincinnati may regulate newsracks that disseminate commercial speech based on the interests it has asserted, I am at a loss as to why its scheme is unconstitutional because it does not also regulate newsracks that disseminate noncommercial speech. One would have thought that the city, perhaps even following the teachings of our commercial speech jurisprudence, could have decided to place the burden of its regulatory scheme on less protected speech (*i. e.*, commercial handbills) without running afoul of the First Amendment. Today's decision, though, places the city in the position of having to decide between restricting more speech—fully protected speech—and allowing the proliferation of newsracks on its street corners to continue unabated. It scarcely seems logical that the First Amendment compels such a result. In my view, the city may order the removal of *all* newsracks from its public right-of-ways if it so chooses. See *Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750, 780–781 (1988) (WHITE, J., joined by STEVENS and O'CONNOR, JJ., dissenting). But however it decides to address its newsrack problem, it should be allowed to proceed in the manner and scope it sees fit so long as it does not violate established First Amendment principles, such as the rule against discrimination on the basis of content. "[L]ittle can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess . . . legislative . . . determinations" on such matters as esthetics. *Metromedia*, 453 U. S., at 570 (REHNQUIST, J., dissenting).

Cincinnati has burdened less speech than necessary to fully accomplish its objective of alleviating the problems caused by the proliferation of newsracks on its street corners. Because I believe the city has established a "reasonable fit" between its substantial safety and esthetic interests and its prohibition against respondents' newsracks, I would hold that the city's actions are permissible under *Central Hudson.* I see no reason to engage in a "time, place, or manner" analysis of the city's prohibition, which in any event strikes me as duplicative of the *Central Hudson* analysis. Cf. *Board of Trustees of State University of N. Y.* v. *Fox,* 492 U. S., at 477. Nor do I think it necessary or wise, on the record before us, to reach the question whether the city's regulatory scheme vests too much discretion in city officials to determine whether a particular publication constitutes a "commercial handbill." See *ante,* at 423, n. 13. It is undisputed, by the parties at least, that respondents' magazines constitute commercial speech. I dissent.

UNITED STATES BY AND THROUGH INTERNAL REVENUE SERVICE *v.* McDERMOTT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 91–1229. Argued December 7, 1992—Decided March 24, 1993

The United States' federal tax lien on respondent McDermotts' property applied to after-acquired property, *Glass City Bank* v. *United States*, 326 U. S. 265, but could "not be valid as against any . . . judgment lien creditor until notice thereof . . . has been filed," 26 U. S. C. § 6323(a). Before that lien was filed with the Salt Lake County Clerk, a bank docketed a state-court judgment it had won against the McDermotts, thereby creating a state-law judgment lien on all of their existing or after-acquired real property in the county. After both liens were filed, the McDermotts acquired certain real property in the county and brought this interpleader action. The District Court awarded priority in that property to the bank's lien. The Court of Appeals affirmed.

Held: A federal tax lien filed before a delinquent taxpayer acquires real property must be given priority in that property over a private creditor's previously filed judgment lien. Priority for purposes of federal law is governed by the common-law principle that " 'the first in time is the first in right.' " *United States* v. *New Britain*, 347 U. S. 81, 85. A state lien that competes with a federal lien is deemed to be in existence for "first in time" purposes only when it has been "perfected" in the sense that, *inter alia*, "the property subject to the lien [is] established." *Id.*, at 84. Because the bank's judgment lien did not actually attach to the property at issue until the McDermotts acquired rights in that property, which occurred *after* the United States filed its tax lien, the bank's lien was not perfected before the federal filing. See *id.*, at 84–86. *United States* v. *Vermont*, 377 U. S. 351, distinguished. It is irrelevant that the federal lien similarly did not attach and become perfected until the McDermotts acquired the property, since § 6323(c)(1) demonstrates that such a lien is ordinarily dated, for purposes of "first in time" priority against § 6323(a) competing interests, from the time of its filing. Pp. 449–455.

945 F. 2d 1475, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, KENNEDY, and SOUTER, JJ., joined.

THOMAS, J., filed a dissenting opinion, in which STEVENS and O'CONNOR, JJ., joined, *post*, p. 455.

James A. Feldman argued the cause for the United States. On the briefs were *Solicitor General Starr, Acting Assistant Attorney General Bruton, Deputy Solicitor General Wallace, Kent L. Jones,* and *William S. Estabrook.*

T. Richard Davis argued the cause for respondents and filed a brief for respondent Zions First National Bank, N. A.

JUSTICE SCALIA delivered the opinion of the Court.

We granted certiorari to resolve the competing priorities of a federal tax lien and a private creditor's judgment lien as to a delinquent taxpayer's after-acquired real property.

I

On December 9, 1986, the United States assessed Mr. and Mrs. McDermott for unpaid federal taxes due for the tax years 1977 through 1981. Upon that assessment, the law created a lien in favor of the United States on all real and personal property belonging to the McDermotts, 26 U. S. C. §§6321 and 6322, including after-acquired property, *Glass City Bank* v. *United States,* 326 U. S. 265 (1945). Pursuant to 26 U. S. C. §6323(a), however, that lien could "not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or *judgment lien creditor* until notice thereof . . . has been filed." (Emphasis added.) The United States did not file this lien in the Salt Lake County Recorder's Office until September 9, 1987. Before that occurred, however—specifically, on July 6, 1987—Zions First National Bank, N. A. (Bank), docketed with the Salt Lake County Clerk a state-court judgment it had won against the McDermotts. Under Utah law, that created a judgment lien on all of the McDermotts' real property in Salt Lake County, "owned . . . at the time or . . . thereafter acquired during the existence of said lien." Utah Code Ann. §78–22–1 (1953).

On September 23, 1987, the McDermotts acquired title to certain real property in Salt Lake County. To facilitate later sale of that property, the parties entered into an escrow agreement whereby the United States and the Bank released their claims to the real property itself but reserved their rights to the cash proceeds of the sale, based on their priorities in the property as of September 23, 1987. Pursuant to the escrow agreement, the McDermotts brought this interpleader action in state court to establish which lien was entitled to priority; the United States removed to the United States District Court for the District of Utah.

On cross-motions for partial summary judgment, the District Court awarded priority to the Bank's judgment lien. The United States Court of Appeals for the Tenth Circuit affirmed. *McDermott* v. *Zions First Nat. Bank, N. A.*, 945 F. 2d 1475 (1991). We granted certiorari. 504 U. S. 939 (1992).

II

Federal tax liens do not automatically have priority over all other liens. Absent provision to the contrary, priority for purposes of federal law is governed by the common-law principle that "'the first in time is the first in right.'" *United States* v. *New Britain*, 347 U. S. 81, 85 (1954); cf. *Rankin* v. *Scott*, 12 Wheat. 177, 179 (1827) (Marshall, C. J.). For purposes of applying that doctrine in the present case—in which the competing state lien (that of a judgment creditor) benefits from the provision of § 6323(a) that the federal lien shall "not be valid . . . until notice thereof . . . has been filed"—we must deem the United States' lien to have commenced no sooner than the filing of notice. As for the Bank's lien: Our cases deem a competing state lien to be in existence for "first in time" purposes only when it has been "perfected" in the sense that "the identity of the lienor, *the property subject to the lien*, and the amount of the lien are established." *United States* v. *New Britain*, 347 U. S., at 84 (emphasis added); see also *id.*, at 86; *United States* v. *Pioneer American Ins. Co.*, 374 U. S. 84 (1963).

The first question we must answer, then, is whether the Bank's judgment lien was perfected in this sense before the United States filed its tax lien on September 9, 1987. If so, that is the end of the matter; the Bank's lien prevails. The Court of Appeals was of the view that this question was answered (or rendered irrelevant) by our decision in *United States* v. *Vermont*, 377 U. S. 351 (1964), which it took to "stan[d] for the proposition that a non-contingent . . . lien on all of a person's real property, perfected prior to the federal tax lien, will take priority over the federal lien, regardless of whether after-acquired property is involved."[1] 945 F. 2d, at 1480. That is too expansive a reading. Our opinion in *Vermont* gives no indication that the property at issue had become subject to the state lien only by application of an after-acquired-property clause to property that the debtor acquired after the federal lien arose. To the contrary, the opinion says that the state lien met (presumably at the critical time when the federal lien arose) "the test laid down in *New Britain* that . . . 'the property subject to the lien . . . [be] established.'" 377 U. S., at 358 (citation omitted).[2]

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[1] As our later discussion will show, we think it contradictory to say that the state lien was "perfected" before the federal lien was filed, insofar as it applies to after-acquired property not acquired by the debtor until after the federal lien was filed. The Court of Appeals was evidently using the term "perfected" (as the Bank would) in a sense not requiring attachment of the lien to the property in question; our discussion of the Court of Appeals' opinion assumes that usage.

[2] The dissent cannot both grant the assumption "that the debtor in *Vermont* acquired its interest in the bank account before the federal lien arose," *post*, at 459, n. 2, and contend that "the debtor's interest in the bank account . . . could have been uncertain or indefinite from the creditors' perspective," *ibid.* In the same footnote, the dissent misdescribes the "critical argument that we rejected" in *Vermont*. *Ibid.* It was not that "the State's claim could not be superior unless the account had been 'specifically identified' as property subject to the State's lien," *ibid.*, but rather that the State's claim could not be superior unless it had

The argument of the United States that we rejected in *Vermont* was the contention that a state lien is not perfected within the meaning of *New Britain* if it "attach[es] to *all* of the taxpayer's property," rather than "to specifically identified portions of that property." 377 U. S., at 355 (emphasis added).[3] We did not consider, and the facts as recited did not implicate, the quite different argument made by the United States in the present case: that a lien in after-acquired property is not "perfected" as to property yet to be acquired.

The Bank argues that, as of July 6, 1987, the date it docketed its judgment lien, the lien was "perfected as to all real property then and thereafter owned by" the McDermotts, since "[n]othing further was required of [the Bank] to attach the non-contingent lien on after-acquired property." Brief for Respondent 21. That reflects an unusual notion of what it takes to "perfect" a lien.[4] Under the Uniform

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"*attach[ed]* to specifically identified portions of that property," *United States* v. *Vermont*, 377 U. S., at 355 (emphasis added).

[3] The dissent claims that "the Government's 'specificity' claim rejected in *Vermont* is analytically indistinguishable from the 'attachment' argument the Court accepts today," since "[i]f specific attachment is not required for the state lien to be 'sufficiently choate,' then neither is specific acquisition." *Post*, at 459 (citation omitted). But the two are not comparable. Until the debtor has acquired the subject property, it is impossible to say that "the property subject to the lien [has been] . . . established," *United States* v. *New Britain*, 347 U. S. 81, 84 (1954). Judicial attachment, on the other hand (and it is important to note that judicial attachment of the property, rather than attachment of the lien to the property, was what the Government's argument in *Vermont* involved), merely brings into the custody of a court property that is *already*—prior to judicial attachment—known to be subject to the lien.

[4] The dissent accepts the Bank's central argument that perfection occurred when "there was 'nothing more to be done' by the Bank 'to have a choate lien' on any real property the McDermotts might acquire." *Post*, at 457–458 (quoting *United States* v. *New Britain*, *supra*, at 84); see also *post*, at 461. This unusual definition of perfection has been achieved by making a small but substantively important addition to the language of *New Britain*. "'[N]othing more to be done . . . to have a choate lien'"

Commercial Code, for example, a security interest in after-acquired property is generally not considered perfected when the financing statement is filed, but only when the security interest has attached to particular property upon the debtor's acquisition of that property. §§ 9–203(1) and (2), 3 U. L. A. 363 (1992); § 9–303(1), 3A U. L. A. 117 (1992). And attachment to particular property was also an element of what we meant by "perfection" in *New Britain.* See 347 U. S., at 84 ("when . . . the property subject to the lien . . . [is] established"); *id.,* at 86 ("[T]he priority of each statutory lien contested here must depend on the time it attached to the property in question and became [no longer inchoate]").[5] The Bank concedes that its lien did not actually attach to the property at issue here until the McDermotts acquired rights

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(the language of *New Britain*) becomes "nothing more to be done *by the Bank* to have a choate lien." Once one recognizes that the dissent's concept of a lien's "becom[ing] certain as to the property subject thereto," see *post,* at 457, 461, is meaningless, see n. 5, *infra,* it becomes apparent that the dissent, like the Bank, would simply have us substitute the concept of "best efforts" for the concept of perfection.

[5] The dissent refuses to acknowledge the unavoidable realities that the property subject to a lien is not "established" until one knows what specific property that is, and that a lien cannot be anything other than "inchoate" with respect to property that is not yet subject to the lien. Hence the dissent says that, upon its filing, the lien at issue here "was perfected, even as to the real property later acquired by the McDermotts, in the sense that it was definite as to the property in question, noncontingent, and summarily enforceable." *Post,* at 457. But how could it have been, at that time, "definite" as to this property, when the identity of this property (established by the McDermotts' later acquisition) was yet unknown? Or "noncontingent" as to this property, when the property would have remained entirely free of the judgment lien had the McDermotts not later decided to buy it? Or "summarily enforceable" against this property when the McDermotts did not own, and had never owned, it? The dissent also says that "[t]he lien was *immediately enforceable* through levy and execution against all the debtors' property, *whenever acquired.*" *Ibid.* (emphases added). But of course it was *not* "immediately enforceable" (as of its filing date, which is the relevant time) against property that the McDermotts had not yet acquired.

in that property. Brief for Respondent 16, 21. Since that occurred *after* filing of the federal tax lien, the state lien was not first in time.[6]

But that does not complete our inquiry: Though the state lien was not first in time, the federal tax lien was not necessarily first in time either. Like the state lien, it applied to the property at issue here by virtue of a (judicially inferred) after-acquired-property provision, which means that it did not attach until the same instant the state lien attached, viz., when the McDermotts acquired the property; and, like the state lien, it did not become "perfected" until that time. We think, however, that under the language of § 6323(a) ("shall not be valid as against any . . . judgment lien creditor until notice . . . has been filed"), the filing of notice renders the federal tax lien extant for "first in time" priority purposes regardless of whether it has yet attached to identifiable property. That result is also indicated by the provision, two subsections later, which accords priority, even against *filed* federal tax liens, to security interests arising out of certain agreements, including "commercial transactions financing agreement[s]," entered into before filing of the tax lien. 26 U. S. C. § 6323(c)(1). That provision protects certain security interests that, like the after-acquired-property judgment lien here, will have been recorded before the filing of the tax lien, and will attach to the encumbered property after the filing of the tax lien, and simultaneously with the attachment of the tax lien (*i. e.*, upon the debtor's acquisition of the subject property). According *special* priority to certain state security interests in these circumstances obviously presumes that otherwise the federal tax lien would prevail—*i. e.,* that the federal tax lien is ordinarily dated, for purposes of "first in time" priority against § 6323(a) competing interests, from the time of its filing, regardless of when it attaches to the subject property.[7]

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[6] The dissent suggests, *post*, at 458, n. 1, that the Treasury Department regulation defining "judgment lien creditor," 26 CFR § 301.6323(h)–1(g) (1992), contradicts our analysis. It would, if it contained only the three requirements that the dissent describes. In fact, however, it says that to prevail the judgment lien must be perfected, and that "[a] judgment lien is not perfected until the identity of the lienor, *the property subject to the lien*, and the amount of the lien are established." *Ibid.* (emphasis added).

The Bank argues that "[b]y common law, the first lien of record against a debtor's property has priority over those subsequently filed unless a lien-creating statute clearly shows or declares an intention to cause the statutory lien to override." Brief for Respondent Zions First National Bank, N. A., 11.[8] Such a strong "first-to-record" presumption may be appropriate for simultaneously perfected liens under ordinary statutes creating private liens, which ordinarily arise out of voluntary transactions. When two private lenders both exact from the same debtor security agreements with after-acquired-property clauses, the second lender knows, by reason of the earlier recording, that that category of property will be subject to another claim, and if the remaining security is inadequate he may avoid the difficulty by declining to extend credit. The Government, by contrast, cannot indulge the luxury of declining to hold the taxpayer liable for his taxes; notice of a previously filed security agreement covering after-acquired property does *not* enable the Government to protect itself. A strong "first-to-record" presumption is particularly out of place under the present tax-lien statute, whose *general rule* is that the tax collector prevails even if he has not recorded *at all.* 26 U. S. C. §§ 6321 and 6322; *United States* v. *Snyder,* 149 U. S. 210 (1893). Thus, while we would hardly proclaim the statutory meaning we have discerned in this opinion to be "clear," it is evident enough for the purpose at hand. The federal tax lien must be given priority.

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[7] The dissent contends that "there is no persuasive reason for not adopting as a matter of federal law the well-recognized common-law rule of parity and giving the Bank an equal interest in the property." *Post,* at 461, n. 4. As we have explained, the persuasive reason is the existence of § 6323(c), which displays the assumption that all perfected security interests are defeated by the federal tax lien. There is no reason why this assumption should not extend to judgment liens as well. A "security interest," as defined in § 6323, is not an insignificant creditor's preference. The term includes only interests protected against subsequent judgment liens. See 26 U. S. C. §§ 6323(h)(1) and 6323(c)(1)(B). Moreover, the text of § 6323(a) ("The lien . . . shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor") treats security interests and judgment liens alike. Parity may be, as the dissent says, a "well-recognized common-law rule," *post,* at 461, n. 4, but we have not hitherto adopted it as the federal law of tax liens in 127 years of tax lien enforcement.

[8] The dissent notes that "[n]othing in the law of judgment liens suggests that the possibility, which existed at the time the Bank docketed its judgment, that the McDermotts would *not* acquire the specific property here at issue was a 'contingency' that rendered the Bank's otherwise perfected general judgment lien subordinate to intervening liens." *Post,* at 460. Perhaps. But priorities here are determined, not by "the law of judgment liens," but by § 6323(a), as our case law has interpreted it. The requirement that competing state liens be perfected is part of that jurisprudence.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE THOMAS, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, dissenting.

I agree with the Court that under 26 U. S. C. § 6323(a) we generally look to the filing of notice of the federal tax lien to determine the federal lien's priority as against a competing state-law judgment lien. I cannot agree, however, that a federal tax lien trumps a judgment creditor's claim to after-acquired property whenever notice of the federal lien is filed before the judgment lien has "attached" to the property. *Ante,* at 451–452. In my view, the Bank's antecedent judgment lien "ha[d] [already] acquired sufficient substance and ha[d] become so perfected," with respect to the McDermotts' after-acquired real property, "as to defeat [the] later-filed federal tax lien." *United States* v. *Pioneer American Ins. Co.,* 374 U. S. 84, 88 (1963).

Applying the governing "first in time" rule, the Court recognizes—as it must—that if the Bank's interest in the property was "perfected in the sense that there [was] nothing more to be done to have a choate lien" before September 9, 1987 (the date the federal notice was filed), *United States* v. *New Britain,* 347 U. S. 81, 84 (1954), "that is the end of the matter; the Bank's lien prevails," *ante,* at 450. Because the Bank's identity as lienor and the amount of its judgment lien are undisputed, the choateness question here reduces to whether "the property subject to the lien" was sufficiently "established" as of that date. *New Britain, supra,* at 84. Accord, *Pioneer American, supra,* at 89. See 26 CFR § 301.6323(h)–1(g) (1992). The majority is quick to conclude that "establish[ment]" cannot precede attachment, and that a lien in after-acquired property therefore cannot be sufficiently perfected until the debtor has acquired rights in the property. See *ante,* at 451–453. That holding does not follow from, and I believe it is inconsistent with, our precedents.

We have not (before today) prescribed any rigid criteria for "establish[ing]" the property subject to a competing lien; we have required only that the lien "*become certain* as to . . . the property subject thereto." *New Britain, supra,* at 86 (emphasis added). Our cases indicate that "certain" means nothing more than "[d]etermined and [d]efinite," *Pioneer American, supra,* at 90, and that the proper focus is on whether the lien is free from "contingencies" that stand in the way of its execution, *United States* v. *Security Trust & Savings Bank,* 340 U. S. 47, 50 (1950). In *Security Trust,* for example, we refused to accord priority to a mere attachment lien that "had not ripened into a judgment," *New Britain, supra,* at 86, and was therefore "contingent upon taking subsequent steps for enforcing it," 340 U. S., at 51.

And in *United States* v. *Vermont,* 377 U. S. 351 (1964), we recognized the complete superiority of a general tax lien held by the State of Vermont upon all property rights belonging to the debtor, even though the lien had not "attach[ed] to [the] specifically identified portions of that property" in which the Federal Government claimed a competing tax lien. *Id.,* at 355. With or without specific attachment, Vermont's general lien was "sufficiently choate to obtain priority over the later federal lien," because it was "summarily enforceable" upon assessment and demand. *Id.,* at 359, and n. 12.

Although the choateness of a state-law lien under § 6323(a) is a federal question, that question is answered in part by reference to state law, and we therefore give due weight to the State's " 'classification of [its] lien as specific and perfected.' " *Pioneer American, supra,* at 88, n. 7 (quoting *Security Trust, supra,* at 49). Here, state law establishes that upon filing, the Bank's judgment lien was perfected, even as to the real property later acquired by the McDermotts, in the sense that it was definite as to the property in question, noncontingent, and summarily enforceable. Pursuant to Utah statute, from the moment the Bank had docketed and filed its judgment with the Clerk of the state court on July 6, 1987, it held an enforceable lien upon all nonexempt real property owned by the McDermotts or thereafter acquired by them during the existence of the lien. See Utah Code Ann. § 78–22–1 (1953). The lien was immediately enforceable through levy and execution against all the debtors' property, whenever acquired. See *Belnap* v. *Blain,* 575 P. 2d 696, 700 (Utah 1978). See also Utah Rule Civ. Proc. 69. And it was "unconditional and not subject to alteration by a court on equitable grounds." *Taylor National, Inc.* v. *Jensen Brothers Constr. Co.,* 641 P. 2d 150, 155 (Utah 1982). Thus, the Bank's lien had become certain as to the property subject thereto, whether then existing or thereafter acquired, and all competing creditors were on notice that there was "nothing more to be done" by the Bank "to have a choate lien" on any real property the McDermotts might acquire. *New Britain, supra,* at 84. See *Vermont, supra,* at 355.[1]

The Court brushes aside the relevance of our *Vermont* opinion with the simple observation that that case did not involve a lien in after-acquired property. *Ante,* at 450–451. This is a wooden distinction. In truth, the Government's "specificity" claim rejected in *Vermont* is analytically indistinguishable from the "attachment" argument the Court accepts today. Vermont's general lien applied to all of the debtor's rights in property, with no limitation on when those rights were acquired, and remained valid until the debt was satisfied or became unenforceable. See 377 U. S., at 352. The United States claimed that its later-filed tax lien took priority over Vermont's as to the debtor's interest in a particular bank account, because the State had not taken "steps to perfect its lien by attaching the bank account in question" until after the federal lien had been recorded. Brief for United States in *United States* v. *Vermont,* O. T. 1963, No. 509, p. 12. "Thus," the Government asserted, "when the federal lien arose, the State lien did not meet one of the three essential elements of a choate lien: that it attach to specific property." *Ibid.* In rejecting the federal claim of priority, we found no need even to mention whether the debtor had acquired its property interest in the deposited funds before or after notice of the federal lien. If specific attachment is not required for the state lien to be "sufficiently choate," 377 U. S., at 359, then neither is specific acquisition.[2]

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[1] The Department of Treasury regulations defining "judgment lien creditor" for purposes of § 6323(a) set forth only three specific requirements for a choate lien (corresponding to the three "establish[ment]" criteria of *New Britain*). The judgment creditor must "obtai[n] a valid judgment" (thus establishing the lienor) for the recovery of "specifically designated property or for a certain sum of money" (thus establishing the amount of the lien), and if recording or docketing is "necessary under local law" for the lien to be effective against third parties, the judgment lien "is not perfected with respect to real property until the time of such recordation or docketing." 26 CFR § 301.6323(h)-1(g) (1992). The last requirement—recording or docketing—is the only specific requirement recognized in the regulations for establishing the real property subject to the judgment lien. The regulations in no way suggest that § 6323(a) imposes any "attachment" condition for after-acquired property. Such a condition would be, in effect, an additional recordation requirement that is not otherwise imposed by local law.

Like the majority's reasoning today, see *ante*, at 452, the Government's argument in *Vermont* rested in part on dicta from *New Britain* suggesting that "attachment to specific property [is] a condition for choateness of a State-created lien." Brief for United States in *United States* v. *Vermont, supra,* at 19. See *New Britain,* 347 U. S., at 86 ("[T]he priority of each statutory lien contested here must depend on the time it *attached* to the property in question and became choate") (emphasis added). *New Britain,* however, involved competing statutory liens that had concededly "attached to the same real estate." *Id.,* at 87. The only issue was whether the liens were otherwise sufficiently choate. Thus, like *Security Trust* (and, in fact, like all of our cases before *Vermont*), *New Britain* provided no occasion to consider the necessity of attachment to property that was not specifically identified at the time the state lien arose.

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[2] Even assuming, as the majority does, that the debtor in *Vermont* acquired its interest in the bank account before the federal lien arose, the critical argument that we rejected in that case was the contention that the State's claim could not be superior unless the account had been "specifically identified" as property subject to the State's lien. 377 U. S., at 355. At the time of the federal filing, the debtor's interest in the bank account, like the McDermotts' interest in the property at issue here, could have been uncertain or indefinite from the creditors' perspective. Nevertheless, in both cases, the particular property was "known to be subject to the [state] lien," *ante*, at 451, n. 3, simply because that lien, by its terms, applied without limitation to all property acquired at any time by the debtor.

Nothing in the law of judgment liens suggests that the possibility, which existed at the time the Bank docketed its judgment, that the McDermotts would *not* acquire the specific property here at issue was a "contingency" that rendered the Bank's otherwise perfected general judgment lien subordinate to intervening liens. Under the relevant background rules of state law, the Bank's interest in after-acquired real property generally could not be defeated by an intervening statutory lien. In some States, the priority of judgment liens in after-acquired property is determined by the order of their docketing. 3 R. Powell, Law of Real Property ¶481[1], p. 38–36 (P. Rohan rev. 1991) (hereinafter Powell). See, *e. g., Lowe* v. *Reierson,* 201 Minn. 280, 287, 276 N. W. 224, 227 (1937). In others, the rule is that "[w]hen two (or more) judgments are successively perfected against a debtor and thereafter the debtor acquires a land interest[,] these liens, attaching simultaneously at the time of the land's acquisition by the debtor, are regarded as on a parity and no priority exists." 3 Powell ¶481[1], pp. 38–35 to 38–36. See, *e. g., Bank of Boston* v. *Haufler,* 20 Mass. App. 668, 674, 482 N. E. 2d 542, 547 (1985); *McAllen State Bank* v. *Saenz,* 561 F. Supp. 636, 639 (SD Tex. 1982). Thus, under state common law, the Bank would either retain its full priority in the property by virtue of its earlier filing or, at a minimum, share an equal interest with the competing lienor.[3] The fact that the prior judgment lien remains effective against third parties without further efforts by the judgment creditor is enough for purposes of

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[3] Article 9 of the Uniform Commercial Code is inapposite, and the Court's reliance on it misplaced. See *ante,* at 451–452. The technical rules governing the perfection and priority of the special security interests in personal property created by Article 9 have no application to traditional judgment liens in real property, see §9–102, 3 U. L. A. 73 (1992), and should have no bearing on the federal doctrine of "choateness." In the context of determining the relative priority of a competing statutory judgment lien, it is *Article 9's* notion of perfection that is the more "unusual." *Ante,* at 451.

§ 6323(a), since the point of our choateness doctrine is to respect the validity of a competing lien where the lien has become certain as to the property subject thereto and the lienor need take no further action to secure his claim. Under this federal-law principle, the Bank's lien was sufficiently choate to be first in time.[4]

I acknowledge that our precedents do not provide the clearest answer to the question of after-acquired property. See *ante*, at 455. But the Court's parsimonious reading of *Vermont* undercuts the congressional purpose—expressed through repeated amendments to the tax lien provisions in the century since *United States* v. *Snyder*, 149 U. S. 210 (1893)—of "protect[ing] third persons against harsh application of the federal tax lien," Kennedy, The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien, 63 Yale L. J. 905, 922 (1954). The attachment requirement erodes the "preferred status" granted to judgment creditors by § 6323(a), and renders a choate judgment lien in after-acquired property subordinate to a “secret lien for assessed taxes.” *Pioneer American*, 374 U. S., at 89. I would adhere to a more flexible choateness principle, which would protect the priority of validly docketed judgment liens.

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[4] Even if the Court were correct that attachment is the determinative criterion of choateness, we would have a tie, since the federal lien "did not attach [to the after-acquired property] until the same instant the state lien attached." *Ante*, at 453. That being so, there is no persuasive reason for not adopting as a matter of federal law the well-recognized common-law rule of parity and giving the Bank an equal interest in the property. See 3 Powell ¶ 481[1]. Section 6323(a)'s requirement that the federal lien be "filed" to be effective may determine when the lien arises for general priority purposes, but the word "filed" provides no textual basis for concluding that a tie goes to the Government, and simply declaring that it does, see *ante*, at 453, does not make it so. The special exception in § 6323(c), which protects later-arising security interests that are based on certain preferred financing agreements, see *ibid.*, does not imply that judgment creditors lose out. Indeed, § 6323(c) demonstrates that Congress *has* considered the question of later-arising property, and the absence of an analogous provision in § 6323(a) suggests that Congress was content to let the courts apply one of the existing background rules to determine the relative priority (or parity) of the federal lien as against competing judgment liens in after-acquired property.

Accordingly, I respectfully dissent.

ARAVE, WARDEN *v.* CREECH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–1160. Argued November 10, 1992—Decided March 30, 1993

After respondent Creech pleaded guilty to first-degree murder for the brutal slaying of a fellow Idaho prison inmate, the state trial judge sentenced him to death based, in part, on the statutory aggravating circumstance that "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." In affirming, the Idaho Supreme Court, among other things, rejected Creech's argument that this aggravating circumstance is unconstitutionally vague and reaffirmed the limiting construction it had placed on the statutory language in *State* v. *Osborn*, 102 Idaho 405, 418–419, 631 P. 2d 187, 200–201, whereby, *inter alia*, "'the phrase "utter disregard" . . . is meant to be reflective of . . . the cold-blooded, pitiless slayer.'" Although the Federal District Court denied habeas corpus relief, the Court of Appeals found the "utter disregard" circumstance facially invalid, holding, among other things, that the circumstance is unconstitutionally vague and that the *Osborn* narrowing construction is inadequate to cure the defect under this Court's precedents.

Held:

1. In light of the consistent narrowing definition given the "utter disregard" circumstance by the Idaho Supreme Court, the circumstance, on its face, meets constitutional standards. Pp. 470–478.

(a) To satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must channel the sentencer's discretion by "'clear and objective standards'" that provide specific and detailed guidance and make rationally reviewable the death sentencing process. See, *e. g., Lewis* v. *Jeffers*, 497 U. S. 764, 774. In order to decide whether a particular aggravating circumstance meets these requirements, a federal court must determine whether the statutory language defining the circumstance is itself too vague to guide the sentencer; if so, whether the state courts have further defined the vague terms; and, if so, whether those definitions are constitutionally sufficient, *i. e.*, whether they provide *some* guidance. *Walton* v. *Arizona*, 497 U. S. 639, 654. However, it is not necessary to decide here whether the statutory phrase "utter disregard for human life" itself passes constitutional muster. The Idaho Supreme Court has adopted a limiting construction, and that construction meets constitutional requirements. Pp. 470–471.

Syllabus

(b) The *Osborn* construction is sufficiently "clear and objective." In ordinary usage, the phrase "cold-blooded, pitiless slayer" refers to a killer who kills without feeling or sympathy. Thus, the phrase describes the defendant's state of mind: not his *mens rea,* but his attitude toward his conduct and his victim. The law has long recognized that such state of mind is not a "subjective" matter, but a *fact* to be inferred from the surrounding circumstances. Although determining whether a capital defendant killed without feeling or sympathy may be difficult, that does not mean that a State cannot, consistent with the Constitution, authorize sentencing judges to make the inquiry and to take their findings into account when deciding whether capital punishment is warranted. Cf. *Walton, supra,* at 655. Pp. 471–474.

(c) Although the question is close, the *Osborn* construction satisfies the requirement that a State's capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty." *Zant* v. *Stephens,* 462 U. S. 862, 877. The class of persons so eligible under Idaho law is defined broadly to include all first-degree murderers, a category which is itself broad because it includes a sizable number of second-degree murderers under specified circumstances. Even within these broad definitions, the word "pitiless," standing alone, might not narrow the class of death eligible defendants, since a sentencing judge might conclude that every first-degree murderer is "pitiless." Given the statutory scheme, however, a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded," since some within the broad class of first-degree murderers *do* exhibit feeling, for example, anger, jealousy, or revenge. Pp. 474–476.

(d) This Court rejects the suggestion of the parties and the dissent that the facial constitutionality of the "utter disregard" circumstance, as construed in *Osborn,* should be determined by examining for consistency the applications of the circumstance by the state courts in other cases. Although the Court's facial challenge precedents authorize a federal court to consider state court *formulations* of a limiting construction to ensure that they are consistent, see, *e. g., Proffitt* v. *Florida,* 428 U. S. 242, 255, n. 12, those precedents have not authorized review of state court cases to determine whether a limiting construction has been *applied* consistently. A comparative analysis of state court cases, moreover, would be particularly inappropriate here. None of the cases on which Creech or the dissent relies influenced either his trial judge or the Idaho Supreme Court, which upheld his death sentence before it had applied *Osborn* to any other set of facts, and thereafter has repeatedly reaffirmed its *Osborn* interpretation. Pp. 476–478.

2. The Court decides only the foregoing question. The Court of Appeals had no occasion to reach the *Jeffers* issue—whether the state

courts' application of the "utter disregard" circumstance to the facts of this case violated the Constitution. See 497 U. S., at 783. Because Creech is already entitled to resentencing in state court on the basis of another of the Court of Appeals' rulings, the posture of the case makes it unnecessary for this Court to reach his remaining arguments. Pp. 478–479.

947 F. 2d 873, reversed in part and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 479.

Lynn E. Thomas, Deputy Attorney General of Idaho, argued the cause for petitioner. With her on the briefs was *Larry EchoHawk*, Attorney General.

Cliff Gardner argued the cause for respondent. With him on the brief was *Claude M. Stern.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In 1981 Thomas Eugene Creech beat and kicked to death a fellow inmate at the Idaho State Penitentiary. He pleaded guilty to first-degree murder and was sentenced to death. The sentence was based in part on the statutory aggravating circumstance that "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." Idaho Code § 19–2515(g)(6) (1987). The sole question we must decide is whether the "utter disregard" circumstance, as interpreted by the Idaho Supreme Court, adequately channels sentencing discretion as required by the Eighth and Fourteenth Amendments.

I

The facts underlying this case could not be more chilling. Thomas Creech has admitted to killing or participating in the killing of at least 26 people. The bodies of 11 of his victims—who were shot, stabbed, beaten, or strangled to death—have been recovered in seven States. Creech has said repeatedly that, unless he is completely isolated from humanity, he likely will continue killing. And he has identified by name three people outside prison walls he intends to kill if given the opportunity.

Creech's most recent victim was David Dale Jensen, a fellow inmate in the maximum security unit of the Idaho State Penitentiary. When he killed Jensen, Creech was already serving life sentences for other first-degree murders. Jensen, about seven years Creech's junior, was a nonviolent car thief. He was also physically handicapped. Part of Jensen's brain had been removed prior to his incarceration, and he had a plastic plate in his skull.

The circumstances surrounding Jensen's death remain unclear, primarily because Creech has given conflicting accounts of them. In one version, Creech killed Jensen in self-defense. In another—the version that Creech gave at his sentencing hearing—other inmates offered to pay Creech or help him escape if he killed Jensen. Creech, through an intermediary, provided Jensen with makeshift weapons and then arranged for Jensen to attack him, in order to create an excuse for the killing. Whichever of these accounts (if either) is true, the Idaho Supreme Court found that the record supported the following facts:

> "Jensen approached Creech and swung a weapon at him which consisted of a sock containing batteries. Creech took the weapon away from Jensen, who returned to his cell but emerged with a toothbrush to which had been taped a razor blade. When the two men again met, Jensen made some movement toward Creech, who then struck Jensen between the eyes with the battery laden sock, knocking Jensen to the floor. The fight continued, according to Creech's version, with Jensen swinging the razor blade at Creech and Creech hitting Jensen with the battery filled sock. The plate imbedded in Jensen's skull shattered, and blood from Jensen's skull was splashed on the floor and walls. Finally, the sock broke

> and the batteries fell out, and by that time Jensen was helpless. Creech then commenced kicking Jensen about the throat and head. Sometime later a guard noticed blood, and Jensen was taken to the hospital, where he died the same day." *State* v. *Creech*, 105 Idaho 362, 364, 670 P. 2d 463, 465 (1983), cert. denied, 465 U. S. 1051 (1984).

Creech pleaded guilty to first-degree murder. The trial judge held a sentencing hearing in accordance with Idaho Code § 19–2515(d) (1987). After the hearing, the judge issued written findings in the format prescribed by Rule 33.1 of the Idaho Criminal Rules. Under the heading "Facts and Argument Found in Mitigation," he listed that Creech "did not instigate the fight with the victim, but the victim, without provocation, attacked him. [Creech] was initially justified in protecting himself." App. 32. Under the heading "Facts and Argumen[t] Found in Aggravation," the judge stated:

> "[T]he victim, once the attack commenced, was under the complete domination and control of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the . . . murder then took on many of the aspects of an assassination. These violent actions . . . went well beyond self-defense.
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> ". . . The murder, once commenced, appears to have been an intentional, calculated act." *Id.*, at 32–33.

The judge then found beyond a reasonable doubt five statutory aggravating circumstances, including that Creech, "[b]y the murder, or circumstances surrounding its commission, . . . exhibited utter disregard for human life." *Id.*, at 34. He observed in this context that "[a]fter the victim was helpless [Creech] killed him." *Ibid.* Next, the judge concluded that the mitigating circumstances did not outweigh the aggravating circumstances. Reiterating that Creech "intentionally destroyed another human being at a time when he was completely helpless," *ibid.*, the judge sentenced Creech to death.

After temporarily remanding for the trial judge to impose sentence in open court in Creech's presence, the Idaho Supreme Court affirmed. The court rejected Creech's argument that the "utter disregard" circumstance is unconstitutionally vague, reaffirming the limiting construction it had placed on the statutory language in *State* v. *Osborn,* 102 Idaho 405, 631 P. 2d 187 (1981):

> "'A . . . limiting construction must be placed upon the aggravating circumstances in I. C. § 19–2515[g](6), that "[b]y the murder, or the circumstances surrounding its commission, the defendant exhibited utter disregard for human life." To properly define this circumstance, it is important to note the other aggravating circumstances with which this provision overlaps. The second aggravating circumstance, I. C. § 19–2515[g](2), that the defendant committed another murder at the time this murder was committed, obviously could show an utter disregard for human life, as could the third aggravating circumstance, I. C. § 19–2515[g](3), that the defendant knowingly created a great risk of death to many persons. The same can be said for the fourth aggravating circumstance, I. C. § 19–2515[g](4), that the murder was committed for remuneration. Since we will not presume that the legislative intent was to duplicate any already enumerated circumstance, thus making [the "utter disregard" circumstance] mere surplusage, we hold that the phrase "utter disregard" must be viewed in reference to acts other than those set forth in I. C. §§ 19–2515[g](2), (3), and (4). We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i. e., the cold-blooded, pitiless slayer.'" *Creech, supra,* at 370,

> 670 P. 2d, at 471 (quoting *Osborn, supra,* at 418–419, 631 P. 2d, at 200–201) (citation omitted).

After independently reviewing the record, the Idaho Supreme Court also held that the evidence clearly supported the trial judge's findings of aggravating and mitigating circumstances, including the finding that Creech had exhibited "utter disregard for human life." 105 Idaho, at 369, 670 P. 2d, at 470. Then, as required by Idaho law, see Idaho Code § 19–2827(c)(3) (1987), the court compared Creech's case to similar cases in order to determine whether his sentence was excessive or disproportionate. The court emphatically concluded that it was not: "We have examined cases dating back more than 50 years and our examination fails to disclose that any such remorseless, calculating, cold-blooded multiple murderer has . . . ever been before this Court." 105 Idaho, at 375, 670 P. 2d, at 476 (footnote omitted).

Creech filed a petition for writ of habeas corpus in the United States District Court for the District of Idaho. The District Court denied relief. See *Creech* v. *Arave,* No. 86–1042 (June 18, 1986). The Court of Appeals for the Ninth Circuit, however, agreed with Creech that the "utter disregard" circumstance is unconstitutionally vague. 947 F. 2d 873 (1991). The court first considered the statutory language itself and concluded that the phrase "utter disregard" does not adequately channel sentencing discretion. *Id.,* at 882–883. The court then considered the *Osborn* narrowing construction and found it unsatisfactory as well. Explaining what "utter disregard" does not mean, the Court of Appeals reasoned, does not give the phrase content. 947 F. 2d, at 883, n. 12. Nor do the words " 'the highest, the utmost, callous disregard for human life' " clarify the statutory language; they merely emphasize it. *Id.,* at 883–884 (citing *Maynard* v. *Cartwright,* 486 U. S. 356, 364 (1988)). The phrase "cold-blooded, pitiless slayer" also was deemed inadequate. The Court of Appeals construed our precedents, including *Walton* v. *Arizona,* 497 U. S. 639 (1990), to require that a limiting construction "defin[e] the terms of the statutory aggravating circumstance through objective standards." 947 F. 2d, at 884. "[C]old-blooded, pitiless slayer" fails, the court said, because it calls for a "subjective determination." *Ibid.* The court found further evidence of the *Osborn* construction's infirmity in its application to this case. In the Court of Appeals' view, the trial judge's findings that Jensen attacked Creech "without provocation" and that the murder " 'evidenc[ed] an excessive violent rage' " could not be reconciled with the conclusion that Creech was a "cold-blooded, pitiless" killer. 947 F. 2d, at 884. The Court of Appeals therefore found the "utter disregard" circumstance facially invalid. *Id.*, at 884–885.

Three judges dissented from an order denying rehearing en banc. The dissenters argued that the panel had misconstrued both the "utter disregard" factor and this Court's prior decisions. Whether a defendant is a "cold-blooded, pitiless slayer," they said, is not a subjective inquiry; it is an evidentiary question to be determined from facts and circumstances. *Id.*, at 890 (opinion of Trott, J.). The dissenters found the *Osborn* limiting construction indistinguishable from the construction this Court approved in *Walton.* 947 F. 2d, at 890. We granted certiorari, limited to the narrow question whether the "utter disregard" circumstance, as interpreted by the Idaho Supreme Court in *Osborn,* is unconstitutionally vague. See 504 U. S. 984 (1992).

II

This case is governed by the standards we articulated in *Walton, supra,* and *Lewis* v. *Jeffers,* 497 U. S. 764 (1990). In *Jeffers* we reaffirmed the fundamental principle that, to satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must " 'suitably direc[t] and limi[t]' " the sentencer's discretion " 'so as to minimize the risk of wholly arbitrary and capricious action.' " *Id.*, at 774 (quoting *Gregg* v. *Georgia,* 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.)). The State must "'channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.'" 497 U. S., at 774 (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion) (internal quotation marks omitted)).

In *Walton* we set forth the inquiry that a federal court must undertake when asked to decide whether a particular aggravating circumstance meets these standards:

> "[The] federal court . . . must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i. e.*, whether they provide *some* guidance to the sentencer." 497 U. S., at 654 (emphasis in original).

Where, as in Idaho, the sentencer is a judge rather than a jury, the federal court must presume that the judge knew and applied any existing narrowing construction. *Id.*, at 653.

Unlike the Court of Appeals, we do not believe it is necessary to decide whether the statutory phrase "utter disregard for human life" itself passes constitutional muster. The Idaho Supreme Court has adopted a limiting construction, and we believe that construction meets constitutional requirements.

Contrary to the dissent's assertions, see *post*, at 481–485, the phrase "cold-blooded, pitiless slayer" is not without content. Webster's Dictionary defines "pitiless" to mean devoid of, or unmoved by, mercy or compassion. Webster's Third New International Dictionary 1726 (1986). The lead entry for "cold-blooded" gives coordinate definitions. One, "marked by absence of warm feelings: without consideration, compunction, or clemency," *id.*, at 442, mirrors the definition of "pitiless." The other defines "cold-blooded" to mean "matter of fact, emotionless." *Ibid.* It is true that "cold-blooded" is sometimes also used to describe "premedita[tion]," Black's Law Dictionary 260 (6th ed. 1990)—a mental state that may coincide with, but is distinct from, a lack of feeling or compassion. But premeditation is clearly not the sense in which the Idaho Supreme Court used the word "cold-blooded" in *Osborn.* Other terms in the limiting construction—"callous" and "pitiless"—indicate that the court used the word "cold-blooded" in its first sense. "Premedita[tion]," moreover, is specifically addressed elsewhere in the Idaho homicide statutes, Idaho Code § 18–4003(a) (1987) (amended version at Supp. 1992); had the *Osborn* court meant premeditation, it likely would have used the statutory language.

In ordinary usage, then, the phrase "cold-blooded, pitiless slayer" refers to a killer who kills without feeling or sympathy. We assume that legislators use words in their ordinary, everyday senses, see, *e. g., INS* v. *Phinpathya,* 464 U. S. 183, 189 (1984), and there is no reason to suppose that judges do otherwise. The dissent questions our resort to dictionaries for the common meaning of the word "cold-blooded," *post,* at 482, but offers no persuasive authority to suggest that the word, in its present context, means anything else.

The Court of Appeals thought the *Osborn* limiting construction inadequate not because the phrase "cold-blooded, pitiless slayer" lacks meaning, but because it requires the sentencer to make a "subjective determination." We disagree. We are not faced with pejorative adjectives such as "especially heinous, atrocious, or cruel" or "outrageously or wantonly vile, horrible and inhuman"—terms that describe a crime as a whole and that this Court has held to be unconstitutionally vague. See, *e. g., Shell* v. *Mississippi,* 498 U. S. 1 (1990) *(per curiam); Cartwright,* 486 U. S., at 363–364; *God-*

frey, supra, at 428–429. The terms "cold-blooded" and "pitiless" describe the defendant's state of mind: not his *mens rea,* but his attitude toward his conduct and his victim. The law has long recognized that a defendant's state of mind is not a "subjective" matter, but a *fact* to be inferred from the surrounding circumstances. See *United States Postal Service Bd. of Governors* v. *Aikens,* 460 U. S. 711, 716–717 (1983) ("'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove . . . , but if it can be ascertained it is as much a fact as anything else'" (quoting *Edgington* v. *Fitzmaurice,* 29 Ch. Div. 459, 483 (1885))).

Determining whether a capital defendant killed without feeling or sympathy is undoubtedly more difficult than, for example, determining whether he "was previously convicted of another murder," Idaho Code § 19–2515(g)(1) (1987). But that does not mean that a State cannot, consistent with the Federal Constitution, authorize sentencing judges to make the inquiry and to take their findings into account when deciding whether capital punishment is warranted. This is the import of *Walton.* In that case we considered Arizona's "especially heinous, cruel, or depraved" circumstance. The Arizona Supreme Court had held that a crime is committed in a "depraved" manner when the perpetrator "'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing." *Walton, supra,* at 655 (quoting *State* v. *Walton,* 159 Ariz. 571, 587, 769 P. 2d 1017, 1033 (1989)). We concluded that this construction adequately guided sentencing discretion, even though "the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision." 497 U. S., at 655; accord, *Jeffers,* 497 U. S., at 777; cf. *Proffitt* v. *Florida,* 428 U. S. 242, 260 (1976) (WHITE, J., concurring in judgment) (approving Florida statutory aggravating circumstances that, "although . . . not susceptible of mechanical application . . . are by no means so vague and overbroad as to leave the discretion of the sentencing authority unfettered").

The language at issue here is no less "clear and objective" than the language sustained in *Walton.* Whether a defendant "relishes" or derives "pleasure" from his crime arguably may be easier to determine than whether he acts without feeling or sympathy, since enjoyment is an affirmative mental state, whereas the cold-bloodedness inquiry in a sense requires the sentencer to find a negative. But we do not think so subtle a distinction has constitutional significance. The *Osborn* limiting construction, like the one upheld in *Walton,* defines a state of mind that is ascertainable from surrounding facts. Accordingly, we decline to invalidate the "utter disregard" circumstance on the ground that the Idaho Supreme Court's limiting construction is insufficiently "objective."

Of course, it is not enough for an aggravating circumstance, as construed by the state courts, to be determinate. Our precedents make clear that a State's capital sentencing scheme also must "genuinely narrow the class of persons eligible for the death penalty." *Zant* v. *Stephens,* 462 U. S. 862, 877 (1983). When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so. See *Jeffers, supra,* at 776; *Godfrey,* 446 U. S., at 433. If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm. See *Cartwright, supra,* at 364 (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder); *Godfrey, supra,* at 428–429 ("A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman' ").

Although the question is close, we believe the *Osborn* construction satisfies this narrowing requirement. The class of murderers eligible for capital punishment under Idaho law is defined broadly to include all first-degree murderers. Idaho Code § 18–4004 (1987). And the category of first-degree murderers is also broad. It includes premeditated murders and those carried out by means of poison, lying in wait, or certain kinds of torture. § 18–4003(a). In addition, murders that otherwise would be classified as second degree, § 18–4003(g)—including homicides committed without "considerable provocation" or under circumstances demonstrating "an abandoned and malignant heart" (a term of art that refers to unintentional homicide committed with extreme recklessness, see American Law Institute, Model Penal Code § 210.2(1)(b) Comment, n. 4 (1980)), Idaho Code §§ 18–4001, 18–4002 (1987)—become first degree if they are accompanied by one of a number of enumerated circumstances. For example, murders are classified as first degree when the victim is a fellow prison inmate, § 18–4003(e), or a law enforcement or judicial officer performing official duties, § 18–4003(b); when the defendant is already serving a sentence for murder, § 18–4003(c); and when the murder occurs during a prison escape, § 18–4003(f), or the commission or attempted commission of arson, rape, robbery, burglary, kidnaping, or mayhem, § 18–4003(d). In other words, a sizable class of even those murderers who kill with some provocation or without specific intent may receive the death penalty under Idaho law.

We acknowledge that, even within these broad categories, the word "pitiless," standing alone, might not narrow the class of defendants eligible for the death penalty. A sentencing judge might conclude that every first-degree murderer is "pitiless," because it is difficult to imagine how a person with any mercy or compassion could kill another human being without justification. Given the statutory scheme, however, we believe that a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded." That is because some within the broad class of first-degree murderers *do* exhibit feeling. Some, for example, kill with anger, jealousy, revenge, or a variety of other emotions. In *Walton* we held that Arizona could treat capital defendants who take pleasure in killing as more deserving of the death penalty than those who do not. Idaho similarly has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death. By doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed.

Creech argues that the Idaho courts have not applied the "utter disregard" circumstance consistently. He points out that the courts have found defendants to exhibit "utter disregard" in a wide range of cases. This, he claims, demonstrates that the circumstance is nothing more than a catchall. The dissent apparently agrees. See *post,* at 485–487. The State, in turn, offers its own review of the cases and contends that they are consistent. In essence, the parties and the dissent would have us determine the facial constitutionality of the "utter disregard" circumstance, as construed in *Osborn,* by examining applications of the circumstance in cases not before us.

As an initial matter, we do not think the fact that "[a]ll kinds of . . . factors," *post,* at 486, may demonstrate the requisite state of mind renders the *Osborn* construction facially invalid. That the Idaho courts may find first-degree murderers to be "cold-blooded" and "pitiless" in a wide range of circumstances is unsurprising. It also is irrelevant to the question before us. We did not undertake a comparative analysis of state court decisions in *Walton.* See 497 U. S., at 655 (construing the argument that the aggravating circumstance "has been applied in an arbitrary manner" as a challenge to the state court's proportionality review). And in *Jeffers* we stated clearly that the question whether state courts properly have applied an aggravating circumstance is separate from the question whether the circumstance, as narrowed, is facially valid. See 497 U. S., at 778–780. To be sure, we previously have examined other state decisions when the *construction* of an aggravating circumstance has been unclear. In *Sochor* v. *Florida*, 504 U. S. 527 (1992), for example, the argument was that the state courts had not adhered to a single limiting construction of Florida's "heinous, atrocious, or cruel" circumstance. *Id.*, at 536–537; see also *Proffitt* v. *Florida*, 428 U. S., at 255, n. 12 (joint opinion of Stewart, Powell, and STEVENS, JJ.) (reviewing other cases to establish that the state courts had construed an aggravating circumstance consistently). Under our precedents, a federal court may consider state court *formulations* of a limiting construction to ensure that they are consistent. But our decisions do not authorize review of state court cases to determine whether a limiting construction has been *applied* consistently.

A comparative analysis of state court cases, moreover, would be particularly inappropriate here. The Idaho Supreme Court upheld Creech's death sentence in 1983—before it had applied *Osborn* to any other set of facts. None of the decisions on which the dissent relies, or upon which Creech asks us to invalidate his death sentence, influenced either the trial judge who sentenced Creech or the appellate judges who upheld the sentence. And there is no question that Idaho's formulation of its limiting construction has been consistent. The Idaho Supreme Court has reaffirmed its original interpretation of "utter disregard" repeatedly, often reciting the definition given in *Osborn* verbatim. See, *e. g.*, *State* v. *Card*, 121 Idaho 425, 435–436, 825 P. 2d 1081, 1091–1092 (1991) (citing cases), cert. denied, 506 U. S. 915 (1992). It also has explained that "utter disregard" differs from Idaho's "heinous, atrocious or cruel" aggravating circumstance, Idaho Code § 19–2515(g)(5) (1987), because the *Osborn* construction focuses on the defendant's state of mind. *State* v.

Fain, 116 Idaho 82, 99, 774 P. 2d 252, 269 ("[T]he 'utter disregard' factor refers not to the outrageousness of the acts constituting the murder, but to the defendant's lack of conscientious scruples against killing another human being"), cert. denied, 493 U. S. 917 (1989). In light of the consistent narrowing definition given the "utter disregard" circumstance by the Idaho Supreme Court, we are satisfied that the circumstance, on its face, meets constitutional standards.

III

Creech argues alternatively that the "utter disregard" circumstance, even if facially valid, does not apply to him. He suggests—as did the Court of Appeals and as does the dissent, *post*, at 488—that the trial judge's findings that he was provoked and that he exhibited an "excessive violent rage" are irreconcilable with a finding of "utter disregard." The Idaho Supreme Court, Creech claims, did not cure the error on appeal. There also appears to be some question whether the other murders that Creech has committed, and the self-defense explanations he has offered for some of them, bear on the "utter disregard" determination. See Tr. of Oral Arg. 5–7, 18–21; cf. *post*, at 488, n. 15.

These are primarily questions of state law. As we said in *Jeffers*, a state court's application of a valid aggravating circumstance violates the Constitution only if "no reasonable sentencer" could find the circumstance to exist. 497 U. S., at 783. The Court of Appeals had no occasion to decide the *Jeffers* issue in this case, since it found the "utter disregard" circumstance facially vague. The posture of the case, moreover, makes it unnecessary for us to reach the remaining arguments. The Court of Appeals granted Creech relief on two other claims: that the trial judge improperly refused to allow him to present new mitigating evidence when he was resentenced in open court, and that the judge applied two aggravating circumstances without making a finding required under state law. See 947 F. 2d, at 881–882. On the basis of the first claim, Creech is entitled to resentencing in state trial court. *Id.*, at 882. Accordingly, we hold today only that the "utter disregard" circumstance, as defined in *Osborn,* on its face meets constitutional requirements. The judgment of the Court of Appeals is therefore reversed in part, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

Confronted with an insupportable limiting construction of an unconstitutionally vague statute, the majority in turn concocts its *own* limiting construction of the state court's formulation. Like "nonsense upon stilts,"[1] however, the majority's reconstruction only highlights the deficient character of the nebulous formulation that it seeks to advance. Because the metaphor "cold-blooded" by which Idaho defines its "utter disregard" circumstance is both vague and unenlightening, and because the majority's recasting of that metaphor is not dictated by common usage, legal usage, or the usage of the Idaho courts, the statute fails to provide meaningful guidance to the sentencer as required by the Constitution. Accordingly, I dissent.

I

I discuss the applicable legal standards only briefly, because, for the most part, I agree with the majority about what is required in a case of this kind. As the majority acknowledges, *ante,* at 474, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens,* 462 U. S. 862,

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[1] J. Bentham, Anarchical Fallacies, in 2 Works of Jeremy Bentham 501 (1843).

877 (1983). A state court's limiting construction can save a flawed statute from unconstitutional vagueness, and where the sentencer is a judge there is nothing wrong with "presum[ing] that the judge knew and applied any existing narrowing construction." *Ante,* at 471. "The trial judge's familiarity with the State Supreme Court's opinions, however, will serve to narrow his discretion only if that body of case law articulates a construction of the aggravating circumstance that is coherent and consistent, and that meaningfully limits the range of homicides to which the aggravating factor will apply." *Walton* v. *Arizona,* 497 U. S. 639, 692 (1990) (dissenting opinion). We have "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." *Maynard* v. *Cartwright,* 486 U. S. 356, 363 (1988). A limiting construction must do more than merely invite the sentencer to assess in some indeterminate way the circumstances of each case. *Clemons* v. *Mississippi,* 494 U. S. 738, 757–761 (1990) (opinion concurring in part and dissenting in part). The source of this requirement is the paramount need to "'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey* v. *Georgia,* 446 U. S. 420, 428 (1980) (plurality opinion), quoting *Woodson* v. *North Carolina,* 428 U. S. 280, 303 (1976) (plurality opinion).

II

The Idaho Supreme Court has determined that under our cases Idaho's statutory phrase, "utter disregard for human life," requires a limiting construction, see *State* v. *Osborn,* 102 Idaho 405, 418, 631 P. 2d 187, 200 (1981); *Sivak* v. *State,* 112 Idaho 197, 209, 731 P. 2d 192, 204 (1986), and petitioner does not challenge the Court of Appeals' conclusion that the phrase, unadorned, fails to meet constitutional standards. This is understandable. Every first-degree murder will demonstrate a lack of regard for human life, and there is no cause to believe that some murders somehow demonstrate only partial, rather than "utter" disregard. Nor is there any evidence that the phrase is intended to have a specialized meaning—other than that presented by the Idaho Supreme Court in its limiting constructions—that might successfully narrow the eligible class. The question is whether *Osborn*'s limiting construction saves the statute.[2]

Under *Osborn*, an offense demonstrates "utter disregard for human life" when the "acts or circumstances surrounding the crime . . . exhibit the highest, the utmost, callous disregard for human life, i. e., the cold-blooded, pitiless slayer." 102 Idaho, at 419, 631 P. 2d, at 201. Jettisoning all but the term, "cold-blooded," the majority contends that this cumbersome construction clearly singles out the killing committed "without feeling or sympathy." *Ante*, at 476. As an initial matter, I fail to see how "without feeling or sympathy" is meaningfully different from "devoid of . . . mercy or compassion"—the definition of "pitiless" that the majority concedes to be constitutionally inadequate. See *ante*, at 471.

Even if there is a distinction, however, the "without feeling or sympathy" test, which never has been articulated by any Idaho court, does not flow ineluctably from the phrase at issue in this case: "cold-blooded." I must stress in this regard the rather obvious point that a "facial" challenge of this nature—one alleging that a limiting construction provides inadequate guidance—cannot be defeated merely by a demonstration that there exists a narrowing way to apply the contested language. The entire point of the challenge is that the language's susceptibility to a *variety* of interpretations is what makes it (facially) unconstitutional. To save the statute, the State must provide a construction that, on its face, reasonably can be expected to be applied in a consistent and meaningful way so as to provide the sentencer with adequate guidance. The metaphor "cold-blooded" does not do this.

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[2] Of course, even if the phrase "utter disregard" were narrowing and clear, a purported limiting construction from the State's high court that actually undid any narrowing or clarity would render the statute unconstitutional. For example, if the statute allowed the death sentence where the murder was committed for pay, but an authoritative construction from the State Supreme Court told trial courts that the statute covered every murder committed for "bad reasons," the state scheme would be unconstitutional. In the present case, any clarity that may be imparted, and any channeling that may be done by the phrase, "utter disregard for human life," is destroyed by the boundless and vague *Osborn* construction adopted as the authoritative interpretation of the statute.

I begin with "ordinary usage." The majority points out that the first definition in Webster's Dictionary under the entry "cold-blooded" is " 'marked by absence of warm feelings: without consideration, compunction, or clemency.' " *Ante,* at 472, quoting Webster's Third New International Dictionary 442 (1986). If Webster's' rendition of the term's ordinary meaning is to be credited, then Idaho has singled out murderers who act without warm feelings: those who act without consideration, compunction, or clemency. Obviously that definition is no more illuminating than the adjective "pitiless" as defined by the majority. What murderer *does* act with consideration or compunction or clemency?[3]

In its eagerness to boil the phrase down to a serviceable core, the majority virtually ignores the very definition it cites. Instead, the majority comes up with a hybrid all its own—"without feeling or sympathy"—and then goes one step further, asserting that because the term "cold-blooded" so obviously means "without feeling," it cannot refer as ordinarily understood to murderers who "kill with anger, jealousy, revenge, or a variety of other emotions." *Ante,* at 476. That is incorrect. In everyday parlance, the term "cold-blooded" *routinely* is used to describe killings that fall outside the majority's definition. In the first nine weeks of this year alone, the label "cold-blooded" has been applied to a murder by an ex-spouse angry over visitation rights,[4] a killing by a jealous lover,[5] a revenge killing,[6] an ex-spouse "full of hatred,"[7] the close-range assassination of an enemy official by a foe in a bitter ethnic conflict,[8] a murder prompted by humiliation and hatred,[9] killings by fanatical cult members,[10] a murderer who enjoyed killing,[11] and, perhaps most appropriately, *all* murders.[12] All these killings occurred with "feelings" of one kind or another. All were described as cold-blooded. The majority's assertion that the Idaho construction narrows the class of capital defendants because it rules out those who "kill with anger, jealousy, revenge, or a variety of other emotions" clearly is erroneous, because in ordinary usage the nebulous description "cold-blooded" simply is not limited to defendants who kill without emotion.

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[3] Cf. *State* v. *Charboneau,* 116 Idaho 129, 172, 774 P. 2d 299, 342 (1989) (Bistline, J., dissenting) ("What first degree murderer fails to show 'callous disregard for human life'? I suppose this would be the 'pitiful' slayer, who, prior to delivering the fatal blow, tells the victim, 'Excuse me, pardon me, I know it's inconvenient, but I must now take your life' ").

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[4] See Kuczka, Self-Defense Claimed in Murder Trial, Chicago Tribune, Feb. 3, 1993, p. 5 ("To prosecutors, Eric Moen is a cold-blooded killer who gunned down his wife's former boyfriend in a Streamwood restaurant parking [lot] during a quarrel over visitation rights to the ex-boyfriend's infant daughter").

[5] See Caba, Friedman Prosecutor Rebuffed, Philadelphia Inquirer, Feb. 19, 1993, p. B3 ("The prosecution contends she killed Edwards in cold blood because he was leaving [her] to return to his wife in Texas").

[6] See McMahon, Dad Does Everything Right, But Son Goes Wrong, Chicago Tribune, Mar. 7, 1993, p. 1 (youth who, according to charges, killed victim after saying "he was going to kill him in retaliation for something [the victim] had done" is, "the state reminds, a cold-blooded killer").

[7] See Gorman, Millionaire Guilty of Killing Ex-Wife, Chicago Tribune, Feb. 3, 1993, p. 1 ("Assistant State's Atty. Robert Egan portrayed Davis as a 'manipulative,' cold-blooded killer . . . . Egan depicted Davis as a man so filled with hatred that he killed Diane Davis two weeks after an Illinois Appellate Court had ruled . . . that he must turn over $1.4 million of his inherited money to his former spouse").

[8] See Burns, U. N. to Ask NATO to Airdrop Supplies for Bosnians, N. Y. Times, Jan. 12, 1993, p. A10 (shooting of Bosnian Deputy Prime Minister by Serbian soldier was described by State Department spokesman Richard A. Boucher as "cold-blooded" murder).

[9] See Man Gets Life For Double Murder, Toronto Star, Mar. 4, 1993, p. A12 (the prosecution "called it 'a cold-blooded killing' spurred by [the defendant's] 'humiliation and hate of these people,' with whom he had squabbled during the 1991 mayoralty campaign").

[10] See McKay, Koresh "Smiled Defiantly" Before Ambush, Agent Says, Houston Chronicle, Mar. 5, 1993, p. A1 ("'These people aren't religious. These people are cold-blooded killers who were shooting at us from every window in that place'").

[11] See Milling, Man Charged in 2 Slayings, Crime Spree, Houston Chronicle, Mar. 5, 1993, p. A23 ("'I'd describe him as a psychopath who gets his gratification by hurting other people,' Carroll said. 'He's not your typical serial killer. He just likes to pull the trigger and watch people die.' . . . 'We knew this guy was a cold-blooded killer,' Carroll said").

In legal usage, the metaphor "cold blood" does have a specific meaning. "Cold blood" is used "to designate a willful, deliberate, and premeditated homicide." Black's Law Dictionary 260 (6th ed. 1990). As such, the term is used to differentiate between first- and second-degree murders.[13] For example, in *United States* v. *Frady*, 456 U. S. 152 (1982), JUS-

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[12] See Longenecker, Penalizing Convicts, Chicago Tribune, Mar. 4, 1993, p. 28 (letter) ("[L]egislation to expand the death penalty to include all convicted murderers is long needed. . . . [I]f an individual commits cold-blooded murder he should be removed from our society").

[13] The line between the "ordinary" and the "legal" meaning of cold-blooded, however, is not always obvious. On the one hand, judges sometimes casually use the phrase in a variety of senses. In those circumstances, contrary to the majority's assumptions, the term regularly is applied to crimes committed "with anger, jealousy, revenge, or a variety of other emotions." See, *e. g., McWilliams* v. *Estelle*, 378 F. Supp. 1380, 1383 (SD Tex. 1974) ("It was the theory of the prosecution that the store owner refused to serve petitioner, that he became angry, went to his hotel room, returned with a pistol, and shot the owner in cold blood"), appeal dism'd, 507 F. 2d 1278 (CA5 1975); *People* v. *Sullivan*, 183 Ill. App. 3d 175, 180, 538 N. E. 2d 1376, 1380 (1989) (the defendant "exhibited repeatedly a very jealous, violent nature. . . . The trial court concluded that if the situation were to arise again, defendant in all probability would kill in cold blood again"); *People* v. *Yates*, 65 Ill. App. 3d 319, 325, 382 N. E. 2d 505, 510 (1978) ("This record reveals a concerted, deliberate attack by Shirley and Emma Yates against their victim, motivated . . . by cold-blooded revenge"). On the other hand, in ordinary parlance the term "cold-blooded" sometimes is used to mean "premeditated." See, *e. g.*, Reward Offered in Slaying of 2 Women in Shadow Park, Los Angeles Times, Jan. 21, 1993, p. J2 (quoting mayor's statement: "'This was one of those in-cold-blood killings, not just a drive-by or random shooting. It was premeditated'").

TICE O'CONNOR, writing for the Court, described the District of Columbia's homicide statute: "'In homespun terminology, intentional murder is in the first degree if committed in cold blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion.'" *Id.*, at 170, n. 18, quoting *Austin* v. *United States*, 127 U. S. App. D. C. 180, 188, 382 F. 2d 129, 137 (1967). Murder in cold blood is, in this sense, the opposite of murder in "hot blood." Arguably, then, the *Osborn* formulation covers every intentional or first-degree murder. An aggravating circumstance so construed would clearly be unconstitutional under *Godfrey*.

Finally, I examine the construction's application by the Idaho courts. The majority acknowledges the appropriateness of examining "other state decisions when the *construction* of an aggravating circumstance has been unclear," such as where state courts have not adhered to a single limiting construction. *Ante*, at 477. Here, however, the majority believes such an inquiry is "irrelevant," *ante*, at 476, because "there is no question that Idaho's formulation of its limiting construction has been consistent," *ante*, at 477. The majority misses the point. Idaho's application of the *Osborn* formulation is relevant not because that formulation has been inconsistently invoked, but because the construction has never meant what the majority says it does. In other words, it is the majority's reconstruction of the (unconstitutional) construction that has not been applied consistently (or ever, for that matter). If, for example, a State declared that "jaberwocky" was an aggravating circumstance, and then carefully invoked "jaberwocky" in every one of its capital cases, this Court could not simply decide that "jaberwocky" means "killing a police officer" and then dispense with any inquiry into whether the term ever had been understood in that way by the State's courts, simply because the "jaberwocky" construction consistently had been reaffirmed.

An examination of the Idaho cases reveals that the *Osborn* formulation is not much better than "jaberwocky." As noted above, the Idaho courts never have articulated anything remotely approaching the majority's novel "those who kill without feeling or sympathy" interpretation. All kinds of other factors, however, have been invoked by Idaho courts applying the circumstance. For example, in *State* v. *Aragon,* 107 Idaho 358, 690 P. 2d 293 (1984), the killer's cold-bloodedness supposedly was demonstrated by his refusal to render aid to his victim and the fact that "[h]is only concern was to cover up his own participation in the incident." *Id.,* at 367, 690 P. 2d, at 302. In *State* v. *Pizzuto,* 119 Idaho 742, 774, 810 P. 2d 680, 712 (1991), a finding of "utter disregard" was held to be supported by evidence that the defendant "approached Mr. Herndon with a gun, then made him drop his pants and crawl into the cabin where he proceeded to bludgeon the skulls of both of his victims with a hammer. He then left them lying on the floor to die and Mr. Herndon was left lying on the floor of the cabin convulsing." And, in the present case, the trial judge's determination that Creech exhibited utter disregard for human life appears to have been based primarily on the fact that Creech had "intentionally destroyed another human being at a time when he was completely helpless." App. 34. Each of these characteristics is frightfully deplorable, but what they have to do with a lack of emotion—or with each other, for that matter—eludes me. Without some rationalizing principle to connect them, the findings of "cold-bloodedness" stand as nothing more than fact-specific, "gut-reaction" conclusions that are unconstitutional under *Maynard* v. *Cartwright,* 486 U. S. 356 (1988).

The futility of the Idaho courts' attempt to bring some rationality to the "utter disregard" circumstance is glaringly evident in the sole post-*Osborn* case that endeavors to explain the construction in any depth. In *State* v. *Fain,* 116 Idaho 82, 774 P. 2d 252, cert. denied, 493 U. S. 917 (1989), the court declared that the "utter disregard" factor refers to "the defendant's lack of conscientious scruples against killing another human being." *Id.*, at 99, 744 P. 2d, at 269. Accord, *State* v. *Card*, 121 Idaho 425, 436, 825 P. 2d 1081, 1092 (1991). Thus, the latest statement from the Idaho Supreme Court on the issue says nothing about emotionless crimes, but, instead, sweepingly includes every murder committed that is without "'conscientious scruples against killing.'" I can imagine no crime that would not fall within that construction.

Petitioner in his brief embraces *Fain*'s broad construction. "In every case in which the Idaho Supreme Court has upheld a death sentence based wholly or in part on a finding of utter disregard for human life, the defendant had acted without conscientious scruple against killing." Brief for Petitioner 25. Petitioner cites this reassuring fact as the "best evidence that Idaho's utter disregard factor is not so broad that it operates simply as a catch-all for murders not covered by other aggravating circumstances." *Id.*, at 24. This "best evidence" is not very good evidence, especially when viewed against the fact that the Idaho Supreme Court never has reversed a finding of utter disregard.[14] Equally unsettling is petitioner's frank admission that the *Osborn* construction "does not make findings of the aggravating factors depend on the presence of particular facts. Instead Idaho has chosen to rely on the ability of the sentencing judge to make principled distinctions between capital and non-capital cases with guidance that is somewhat subjective . . . .” Brief for Petitioner 9. That kind of gestalt approach to capital sentencing is precisely what *Cartwright* and *Godfrey* forbid.

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[14] The State suggests in its brief that on one occasion the Idaho Supreme Court found that the evidence did not support an utter disregard finding. Brief for Petitioner 27, citing *State* v. *Charboneau*, 116 Idaho 129, 774 P. 2d 299 (1989). It is not at all clear, however, that that is what occurred in *Charboneau*. The court there vacated a sentence because it was "unclear from the [trial court's] Findings whether the trial court would have imposed the death penalty without having [mistakenly] concluded that [the victim] was not mortally wounded until the second volley of shots was fired." *Id.*, at 151, 774 P. 2d, at 321. There is no mention in this part of the opinion of the "utter disregard" factor, nor any suggestion that the erroneous finding tainted the "utter disregard" factor rather than the "heinous, atrocious, and cruel" circumstance that was at issue in that case.

Ultimately, it hardly seems necessary to look beyond the record of this case to determine that either the majority's construction is inadequate, or that there was insufficient evidence to support the “utter disregard” factor here. The record, which the majority takes pains to assure us “could not be more chilling,” *ante,* at 465,[15] includes an explicit finding by the trial judge that Creech was the subject of an unprovoked attack and that the killing took place in an “excessive violent rage.” App. 52. If Creech somehow is covered by the “utter disregard” factor as understood by the majority (one who kills not with anger, but indifference, *ante,* at 476), then there can be no doubt that the factor is so broad as to cover any case. If Creech is not covered, then his sentence was wrongly imposed.

III

Let me be clear about what the majority would have to show in order to save the Idaho statute: that, on its face, the *Osborn* construction—“the highest, the utmost, callous disregard for human life, *i. e.,* the cold-blooded, pitiless slayer”—refers *clearly* and *exclusively* to crimes that occur “without feeling or sympathy,” that is, to those that occur without "anger, jealousy, revenge, or a variety of other emotions." No such showing has been made.

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[15] I note that much of the majority's discussion of the “facts underlying this case” centers on Creech's *other* crimes—which obviously do not bear on whether “[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life”—and on the argument, repeatedly rejected by the state courts, that Creech engineered the fight with Jensen in order to create a pretext for killing him. The Idaho Supreme Court explicitly noted that the trial court did not “find that the murder had been performed on contract or by plan.” *State* v. *Creech,* 105 Idaho 362, 364, 670 P. 2d 463, 465 (1983), cert. denied, 465 U. S. 1051 (1984). In fact, the trial court not only found that Jensen's attack was “unprovoked,” but it went further and found that the unprovoked nature of the attack actually constituted a *mitigating* factor. See App. 52.

There is, of course, something distasteful and absurd in the very project of parsing this lexicon of death. But as long as we are in the death business, we shall be in the parsing business as well. Today's majority stretches the bounds of permissible construction past the breaking point. "'Vague terms do not suddenly become clear when they are defined by reference to other vague terms,'" *Walton* v. *Arizona*, 497 U. S., at 693–694, n. 16 (dissenting opinion), quoting *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1489 (CA10 1987), nor do sweeping categories become narrow by mere restatement. The *Osborn* formulation is worthless, and neither common usage, nor legal terminology, nor the Idaho cases support the majority's attempt to salvage it. The statute is simply unconstitutional and Idaho should be busy repairing it.

I would affirm the judgment of the Court of Appeals.

DELAWARE *v.* NEW YORK

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 111, Orig. Argued December 9, 1992—Decided March 30, 1993

Most of the funds at issue are unclaimed dividends, interest, and other securities distributions held by intermediary banks, brokers, and depositories in their own names for beneficial owners who cannot be identified or located. New York escheated $360 million in such funds held by intermediaries doing business in that State, without regard to the beneficial owner's last known address or the intermediary's State of incorporation. After Delaware initiated this original action against New York, alleging that certain of the securities were wrongfully escheated, the Special Master filed a report recommending that this Court award the right to escheat to the State in which the principal executive offices of the securities issuer are located. Both Delaware and New York lodged exceptions to the report.

Held: The State in which the intermediary is incorporated has the right to escheat funds belonging to beneficial owners who cannot be identified or located. Pp. 497–510.

(a) Under the primary and secondary rules adopted in *Texas* v. *New Jersey,* 379 U. S. 674, 680–682, reaffirmed in *Pennsylvania* v. *New York,* 407 U. S. 206, and reaffirmed in this case, the Court resolves disputes among States over the right to escheat abandoned intangible personal property in three steps. First, the Court must determine the precise debtor-creditor relationship, as defined by the law that created the property at issue. Second, because the property interest in any debt belongs to the creditor rather than the debtor, the primary rule gives the first opportunity to escheat to the State of the creditor's last known address, as shown by the debtor's books and records. Third, if the primary rule fails because the debtor's records disclose no address or because the creditor's last known address is in a State whose laws do not provide for escheat, the secondary rule awards the right to escheat to the State in which the debtor is incorporated. Pp. 497–500.

(b) Because the bulk of the abandoned distributions at issue cannot be traced to any identifiable beneficial owner, much less one with a last known address, these funds fall out of the primary rule and into the secondary rule. P. 500.

(c) Intermediaries who hold unclaimed securities distributions in their own names are the relevant "debtors." Issuers cannot be considered "debtors" once they make distributions to intermediaries that are record owners, since payment to a record owner discharges all of an issuer's obligations to the beneficial owner under the Uniform Commercial Code, which is the law in all 50 States and the District of Columbia. Instead, an intermediary serving as the record owner is the "debtor" insofar as it has a contractual duty to transmit distributions to the beneficial owner. Unlike an issuer, it remains liable should a "lost" beneficial owner reappear to collect distributions due under such a contract. The Master thus erred in concluding that the issuer is the relevant "debtor," and Delaware's and New York's exceptions in this regard are sustained. Pp. 500–505.

(d) Precedent, efficiency, and equity dictate rejection of the second major premise underlying the Master's recommendation: his proposal to locate a corporate debtor in the jurisdiction of its principal domestic executive offices rather than in the State of its incorporation. This *sua sponte* proposal would change the Court's longstanding practice under *Texas* and *Pennsylvania*. Moreover, as the Court recognized in *Texas*, *supra*, at 680, the proposal would leave too much for decision on a case-by-case basis. The mere introduction of any factual controversy over the location of a debtor's principal executive offices needlessly complicates an inquiry made irreducibly simple by *Texas*' adoption of a test based on the State of incorporation. Finally, the proposal cannot survive independent of the Master's erroneous decision to treat the issuers as the relevant "debtors." The arguably arbitrary decision to incorporate in one jurisdiction bears no less on a company's business activities than the equally arbitrary decision to locate its principal offices in another jurisdiction, and there is no inequity in rewarding a State whose laws prove more attractive to firms that wish to incorporate. Thus, Delaware's exception to the Master's proposal in this regard is sustained. Pp. 505–507.

(e) New York's exception to the Master's application of the primary rule is overruled. New York contends that many of the disputed funds need not be escheated under the secondary rule because a statistical analysis of the relevant transactions on the books of the debtor *brokers* reveals creditor brokers, virtually all of whom have New York addresses. This proposal rests on the dubious supposition that the relevant "creditors" under the primary rule are other brokers, whereas this Court has already held that "creditors" are the parties to whom the intermediaries are contractually obligated to deliver unclaimed securities distributions. Moreover, the exception must fail because the Court rejected a practically identical proposal in *Pennsylvania*, *supra*, at 214–215. On remand, however, if New York or one of the other claimant States can prove on a transaction-by-transaction basis that the creditors who were owed particular distributions had last known addresses within its borders or can provide some other proper mechanism for ascertaining those addresses, that State will prevail under the primary rule, and the secondary rule will not control. Pp. 507–509.

(f) To depart from the Court's interstate escheat precedent by crafting different rules for the novel facts of each case would generate much uncertainty and threaten much expensive litigation. If the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress, which may reallocate abandoned property among them without regard to the Court's rules. P. 510.

Exceptions sustained in part and overruled in part, and case remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. WHITE, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post,* p. 510.

Dennis G. Lyons argued the cause for plaintiff. With him on the briefs were *Charles M. Oberly III,* Attorney General of Delaware, *J. Patrick Hurley, Jr.,* Deputy Attorney General, and *Kent A. Yalowitz.*

Jerry Boone, Solicitor General of New York, argued the cause for defendant. With him on the briefs were *Robert Abrams,* Attorney General, and *Robert A. Forte,* Assistant Attorney General.

Bernard Nash argued the cause for intervenors State of Alabama et al. With him on the briefs were *Andrew P. Miller, William Bradford Reynolds, Judith E. Schaeffer, Dan Schweitzer, Daniel E. Lungren,* Attorney General of California, *Roderick E. Walston,* Chief Assistant Attorney General, *Thomas F. Gede,* Special Assistant Attorney General, and *Yeoryios C. Apallas,* Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Jimmy Evans* of Alabama, *Charles Cole* of Alaska, *Winston Bryant* of Arkansas, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Warren Price III* of Hawaii, *Roland W. Burris* of Illinois, *Linley E. Pearson* of Indiana, *Bonnie Campbell* of Iowa, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Richard Ieyoub* of Louisiana, *Michael E. Carpenter* of Maine, *Mike Moore* of Mississippi, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of Nevada, *John P. Arnold* of New Hampshire, *Robert J. Del Tufo* of New Jersey, *Nicholas J. Spaeth* of North Dakota, *Lee Fisher* of Ohio, *Susan B. Loving* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *James E. O'Neil* of Rhode Island, *Mark Barnett* of South Dakota, *R. Paul Van Dam* of Utah, *Jeffrey L. Amestoy* of Vermont, *Kenneth O. Eikenberry* of Washington, *Mario J. Palumbo* of West Virginia, and *Joseph B. Meyer* of Wyoming.

James F. Flug, Martin Lobel, Frank J. Kelley, Attorney General of Michigan, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *John Payton,* Corporation Counsel of District of Columbia, *Charles L. Reischel,* Deputy Corporation Counsel, and *Lutz Alexander Prager,* Assistant Deputy Corporation Counsel, *Don Stenberg,* Attorney General of Nebraska, and *Dale A. Comer,* Assistant Attorney General, filed briefs for intervenors State of Michigan et al.

A brief for intervenors State of Texas et al. was filed by *Dan Morales,* Attorney General of Texas, *Will Pryor,* First Assistant Attorney General, *Mary R. Keller,* Deputy Attorney General, and *James A. Thomassen* and *Jeffrey A. Coryell,* Assistant Attorneys General, *Grant Woods,* Attorney General of Arizona, and *Gail H. Boyd,* Assistant Attorney General, *Gale A. Norton,* Attorney General of Colorado, *Raymond T. Slaughter,* Chief Deputy Attorney General, *Timothy M. Tymkovich,* Solicitor General, and *Maurice Knaizer,* Assistant Attorney General, *Richard Blumenthal,* Attorney General of Connecticut, and *William J. Prensky,* Assistant Attorney General, *Larry EchoHawk,* Attorney General of Idaho, and *Theodore V. Spangler, Jr.*, and *Lawrence G. Sirhall, Jr.*, Deputy Attorneys General, *Hubert H. Humphrey III,* Attorney General of Minnesota, and *Alan Gilbert,* Assistant Attorney General, *Tom Udall,* Attorney General of New Mexico, and *Guru Terath Singh Khalsa,* Assistant Attorney General, *Lacy H. Thornburg,* Attorney General of North Carolina, *Andrew A. Vanore, Jr.,* Chief Deputy Attorney General, *M. Ann Reed,* Senior Deputy Attorney General, and *Douglas A. Johnston,* Assistant Attorney General, *Charles S. Crookham,* Attorney General of Oregon, *Jack L. Landau,* Deputy Attorney General, *Virginia L. Linder,* Solicitor General, and *William R. Cook,* Assistant Attorney General, *T. Travis Medlock,* Attorney General of South Carolina, *Ray N. Stevens,* Chief Deputy Attorney General, and *Ronald W. Urban,* Deputy Attorney General, *Charles W. Burson,* Attorney General of Tennessee, and *Michael W. Catalano,* Deputy Attorney General, *James E. Doyle,* Attorney General of Wisconsin, and *Burneatta Bridge,* Assistant Attorney General, *Mary Sue Terry,* Attorney General of Virginia, *Stephen D. Rosenthal,* Chief Deputy Attorney General, *Gail Starling Marshall* and *Mary Yancey Spencer,* Deputy Attorneys General, and *E. Suzanne Darling,* Assistant Attorney General.*

JUSTICE THOMAS delivered the opinion of the Court.

In this original action, we resolve another dispute among States that assert competing claims to abandoned intangible personal property. Most of the funds at issue are unclaimed securities distributions held by intermediary banks, brokers, and depositories for beneficial owners who cannot be identified or located. The Special Master proposed awarding the right to escheat such funds to the State in which the principal executive offices of the securities issuer are located. Adhering to the rules announced in *Texas* v. *New Jersey,* 379 U. S. 674 (1965), and *Pennsylvania* v. *New York,* 407 U. S. 206 (1972), we hold that the State in which the intermediary is incorporated has the right to escheat funds belonging to beneficial owners who cannot be identified or located.

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*Briefs of *amici curiae* were filed for Midwest Securities Trust Co. et al. by *Michael Fischer* and *Ilene Knable Gotts;* and for the Securities Industry Association et al. by *Judith Welcom.*

I

This case involves unclaimed dividends, interest, and other distributions made by issuers of securities. Such payments are often channeled through financial intermediaries such as banks, brokers, and depositories before they reach their beneficial owners. By arrangement with the beneficial owners, these intermediaries frequently hold securities in their own names rather than in the names of the beneficial owners; as "record owners," the intermediaries are fully entitled to receive distributions based on those securities.[1] This practice of holding securities in "nominee name" or "street name" facilitates the offering of customized financial services such as cash management accounts,[2] brokerage margin accounts,[3] discretionary trusts,[4] and dividend reinvestment programs.[5] Street name accounts also permit changes in beneficial ownership to be effected through book entries rather than the unwieldy physical transfer of securities certificates. See Brown, The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory

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[1] An individual investor who opts to retain record ownership of a security will receive distributions directly from the issuer. This case does not concern transactions of this sort.

[2] In a cash management account, the broker holds, rather than distributes, dividends and interest paid on a customer's securities. The customer withdraws funds through a check-like negotiable instrument and receives interest on held funds, typically at a rate higher than that offered on passbook savings accounts and negotiable-order-of-withdrawal accounts.

[3] In a brokerage margin account, the broker holds the customer's securities as collateral against any margin debt generated by the customer's stock market transactions. Dividends and other distributions may be credited against a customer's margin debt to the broker.

[4] In a discretionary trust, the financial institution as trustee enjoys the discretion not to distribute current income but rather to accumulate it for further investment.

[5] In a dividend reinvestment program, the beneficial owner authorizes the broker to use dividends to purchase additional shares and fractional shares.

Utility or Futility?, 13 J. Corp. L. 683, 688–691 (1988). The economies of scale attained in the modern financial services industry are epitomized by the securities depository, a large institution that holds only the accounts of "participant" brokers and banks and serves as a clearinghouse for its participants' securities transactions. Because a depository retains record ownership of securities, it effectively "immobilizes" the certificates in its possession by allowing its participants to trade securities without the physical transfer of certificates. Most of the equity securities traded on the New York Stock Exchange are immobilized in this fashion. See App. to Report of the Special Master B–2. Cf. Securities and Exchange Commission, Division of Market Regulation, Progress and Prospects: Depository Immobilization of Securities and Use of Book-Entry Systems 4 (1985).

The intermediaries are unable to distribute a small portion of the securities to their beneficial owners.[6] When an intermediary claims no property interest in funds so held, they become escheatable.[7] Between 1985 and 1989, New York escheated $360 million in funds of abandoned securities held for more than three years by intermediaries doing business in New York, without regard to the last known address of the beneficial owner or the intermediary's State of incorporation. N. Y. Aband. Prop. Law § 511 (McKinney 1991). See Report of Special Master 10, n. 9. Alleging that certain of these securities were wrongfully escheated, Delaware sought leave in 1988 to initiate an original action in this Court against

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[6] Approximately 0.02% of funds distributed through intermediaries cannot be traced to their beneficial owners. This low percentage nevertheless accounts for a very substantial amount of escheatable property. See Report of Special Master 10, n. 9.

[7] Unlike Depository Trust Company, the two other securities depositories in the United States "do claim entitlement to certain securities, interest payments, dividends and distributions that cannot be accounted for." Brief for Midwest Securities Trust Co. et al. as *Amici Curiae* 2. The issue of these depositories' "entitlement to the excess funds under their rules" is not before us. *Id.*, at 3.

New York. We granted leave to file the complaint, 486 U. S. 1030 (1988), and appointed a Special Master, 488 U. S. 990 (1988). We granted Texas' motion to file a complaint as an intervening plaintiff, 489 U. S. 1005 (1989), and every State not already a party to this proceeding and the District of Columbia sought leave to intervene.

On January 28, 1992, the Master filed his report and recommendation. Both Delaware and New York have lodged exceptions to the report, as have four other parties whose motions for leave to intervene have not been granted by this Court.[8] We now sustain two of Delaware's exceptions in their entirety, one of Delaware's exceptions in part, and one of New York's exceptions. We also grant all pending motions to intervene and to file briefs as *amici curiae*, overrule all exceptions not sustained in this opinion, and remand for further proceedings before the Master.

II

States as sovereigns may take custody of or assume title to abandoned personal property as *bona vacantia*, a process commonly (though somewhat erroneously) called escheat.[9] See, *e. g., Christianson* v. *King County*, 239 U. S. 356, 365–366 (1915); *Cunnius* v. *Reading School Dist.*, 198 U. S. 458, 469–476 (1905); *Hamilton* v. *Brown*, 161 U. S. 256, 263–264 (1896). No serious controversy can arise between States seeking to escheat "tangible property, real or personal," for "it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat." *Texas* v. *New Jersey,* 379 U. S., at 677. On the other hand, intangible property "is not physical matter which can be located on a map," *ibid.*, and frequently no single State can claim an uncontested right to escheat such property.

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[8] In a joint brief, Michigan, Maryland, Nebraska, and the District of Columbia filed two exceptions to the Master's report.

[9] "At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia.*" *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 240 (1944). See generally 7 W. Holdsworth, A History of English Law 495–496 (2d ed. 1937). Our opinions, however, have understood "escheat" as encompassing the appropriation of both real and personal property, and we use the term in that broad sense.

In *Texas* v. *New Jersey,* we discharged "our responsibility in the exercise of our original jurisdiction" to resolve escheat disputes that "the States separately are without constitutional power . . . to settle." *Ibid.*[10] We adopted two rules intended to "settle the question of which State will be allowed to escheat [abandoned] intangible property." *Ibid.* "[S]ince a debt is property of the creditor, not of the debtor," we reasoned, "fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." *Id.*, at 680–681 (footnote omitted). This primary rule had the virtue of "involv[ing] a factual issue simple and easy to resolve," made even simpler by the Court's resort to "last known address, rather than technical legal concepts of residence and domicile." *Id.*, at 681. It also achieved rough equity in that it "tend[ed] to distribute escheats among the States in the proportion of the commercial activities of their residents." *Ibid.* We recognized, however, that the primary rule could not resolve escheat claims over "property owed persons (1) as to whom there is no record of any address at all, or (2) whose last known address is in a State which does not provide for escheat of the property owed them." *Id.*, at 682. For these situations, we adopted a secondary rule awarding the right to escheat to the debtor's "State of corporate domicile," subject to the claims of the State with "a superior right to escheat" under the primary rule. *Ibid.* We characterized the *Texas* scheme as "the fairest, . . . easy to apply, and in the long run . . . the most generally acceptable to all the States." *Id.*, at 683.

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[10] See also *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U. S. 71, 75 (1961); *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 443 (1951).

We reaffirmed *Texas* in *Pennsylvania* v. *New York*, 407 U. S. 206 (1972). *Texas* had involved the relatively simple case of a debtor that "disclaimed any interest" in "various small debts . . . owed to . . . small creditors who ha[d] never appeared to collect them." *Texas, supra,* at 676, 675. In *Pennsylvania,* by contrast, the Western Union Company held proceeds left unclaimed because Western Union was unable to locate the payee of a money order or to make a refund to the sender or because drafts issued by Western Union were not negotiated. See 407 U. S., at 208–209; *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U. S. 71, 72–73 (1961). Because Western Union did not "regularly record the addresses of its money order creditors," the primary rule would rarely apply, and the debtor's State of incorporation—Western Union's "corporate domicile"—would "receive a much larger share of the unclaimed funds" under the secondary rule. *Pennsylvania,* 407 U. S., at 214. In response to this perceived injustice, other States advocated a rule allowing the State of "the place of purchase" to escheat under the primary rule. We nevertheless adhered to our decision in *Texas.* The "only arguable" difference between money orders and the obligations at issue in *Texas* lay in the fact that money orders "involve a higher percentage of unknown addresses." 407 U. S., at 214. We reasoned that neither this distinction nor the resulting "likelihood of a 'windfall'" for the debtor's State of incorporation would justify the "carving out [of an] exception to the *Texas* rule." *Ibid.*

We therefore resolve disputes among States over the right to escheat intangible personal property in the following three steps. First, we must determine the precise debtor-creditor relationship as defined by the law that creates the property at issue. Second, because the property interest in any debt belongs to the creditor rather than the debtor, the primary rule gives the first opportunity to escheat to the

State of "the creditor's last known address as shown by the debtor's books and records." *Texas, supra,* at 680–681. Finally, if the primary rule fails because the debtor's records disclose no address for a creditor or because the creditor's last known address is in a State whose laws do not provide for escheat, the secondary rule awards the right to escheat to the State in which the debtor is incorporated. These rules arise from our "authority and duty to determine for [ourselves] all questions that pertain" to a controversy between States, *Kentucky* v. *Indiana,* 281 U. S. 163, 176 (1930), and no State may supersede them by purporting to prescribe a different priority under state law.

III

None of the parties contests the primary rule or the Master's recommendation that "where the state of domicile of an unlocatable entitled recipient is known, through finding a last known address, that state may take custody of the unclaimed distributions." Report of Special Master 56–57 (footnote omitted).[11] The bulk of the abandoned distributions at issue, however, cannot be traced to any identifiable beneficial owner, much less one with a last known address. These funds thus fall out of the primary rule and into the secondary rule. Consequently, under *Texas* and *Pennsylvania,* the debtor's State of incorporation should be entitled to escheat this unclaimed property. The Master's report concludes, first, that the issuer of securities is the relevant "debtor" and, second, that the State in which the debtor's "principal executive offices" are located should be considered the debtor's State. We reject both of these recommendations.

A

"[W]here the entitled recipient's domicile is undeterminable (no last known address), but the state of domicile of the originator of the distribution is known," the Master recommended that the originator's State be awarded the right to escheat, "whether or not the originator would have been entitled to receive the funds back in its own right." Report of Special Master 57. Because he construed the use of the terms "debtor" and "creditor" in *Texas* and *Pennsylvania* as a merely "descriptive . . . attempt to identify the relevant parties" rather than "prescriptive legal commands," Report of Special Master 29, the Master defined "debtor" as "the last owner of the funds, in the sense of the last person who had a claim to the funds as an asset that would appropriately be reflected in the net worth of the entity in question," *id.*, at 32. In its first exception, Delaware argues that "the Report's recommendation in this regard does not comport with the ordinary meaning of the words 'debtor' and 'creditor,' is inconsistent with universally-accepted state and common law and with the principles underlying the *Texas* rule, and changes the law in an area where the law should be settled." Exceptions and Brief for Plaintiff Delaware E–4. Delaware also objects to the Master's failure to "ascrib[e] . . . legal relevance to [intermediaries'] status as record security holders," a "fundamental factual error" that effectively treats record owners "as if they were paying agents." *Id.*, at E–5. New York's first exception likewise objects to the Master's use of "the term 'debtor' as 'shorthand' to identify parties with 'debtor attributes' rather than the obligor of the debt." Exceptions of Defendant New York 52. We agree with both States and sustain their exceptions.

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[11] New York has filed an exception to the Master's application of the primary rule. We address this argument in Part IV below.

We have not relied on legal definitions of "creditor" and "debtor" merely for descriptive convenience. Rather, we have grounded the concepts of "creditor" and "debtor" in the positive law that gives rise to the property at issue. In framing a State's power of escheat, we must first look to the law that creates property and binds persons to honor property rights. "Property interests, of course, are not created by the Constitution," but rather "by existing rules or understandings that stem from an independent source such as state law." *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 577 (1972). Accord, *e. g., Bishop* v. *Wood,* 426 U. S. 341, 344–347 (1976); *Paul* v. *Davis,* 424 U. S. 693, 710–712 (1976). See also *Barnhill* v. *Johnson,* 503 U. S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law"). Furthermore, law that creates property necessarily defines the legal relationships under which certain parties ("debtors") must discharge obligations to others ("creditors").

To define "debtor" as "the last person who ha[s] a claim to the funds as an asset that would appropriately be reflected in [his] net worth," Report of Special Master 32, would convert a term rich with prescriptive legal content into little more than a description of bookkeeping phenomena. Funds held by a debtor become subject to escheat because the debtor has no interest in the funds—precisely the opposite of having "a claim to the funds as an asset." We have recognized as much in cases upholding a State's power to escheat neglected bank deposits. Charters, bylaws, and contracts of deposit do not give a bank the right to retain abandoned deposits, and a law requiring the delivery of such deposits to the State affects no property interest belonging to the bank. *Security Savings Bank* v. *California,* 263 U. S. 282, 285–286 (1923); *Provident Institution for Savings* v. *Malone,* 221 U. S. 660, 665–666 (1911). Thus, "deposits are *debtor obligations* of the bank," and a State may "protect the interests of depositors" as creditors by assuming custody over accounts "inactive so long as to be presumptively abandoned." *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233, 241 (1944) (emphasis added). Such "disposition of abandoned property is a function of the state," a sovereign "exercise of a regulatory power" over property and the private legal obligations inherent in property. *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 436 (1951).

Our rules regarding interstate disputes over competing escheat claims cannot be severed from the law that creates the underlying creditor-debtor relationships. In *Texas* and *Pennsylvania,* our examination of the holder's legal obligations not only defined the escheatable property at issue but also carefully identified the relevant "debtors" and "creditors." See *Texas,* 379 U. S., at 675–676, n. 4; *Pennsylvania,* 407 U. S., at 208–209, 213. In *Pennsylvania,* we noted that Western Union was a "debtor" insofar as it owed contractual duties to two separate creditors. Western Union was obligated not merely to deliver a negotiable draft to the sender's payee; if Western Union could not locate the payee or if the payee failed to claim his money order, the company was bound to make a refund to the sender. *Id.,* at 208–209. Correspondingly, we recognized that the relevant "creditor" might be either a payee or a sender: "the payee of an unpaid draft, the sender of a money order entitled to a refund," or a payee or sender "whose claim has been underpaid through error." *Id.,* at 213 (internal quotation marks omitted).

Moreover, the rules developed in *Texas* and *Pennsylvania* reflect the traditional view of escheat as an exercise of sovereignty over persons and property owned by persons. The primary rule flowed from the common-law "concept of '*mobilia sequuntur personam,*' according to which intangible personal property is found at the domicile of its owner." *Texas, supra,* at 680, n. 10. Accord, *Pennsylvania, supra,* at 217–218 (Powell, J., dissenting). See also *Blodgett* v. *Silberman,* 277 U. S. 1, 10 (1928) ("[I]ntangible personalty has . . . a *situs* at the domicil of the owner"). In recognizing that "a debt is property of the creditor," *Texas, supra,* at 680, the primary rule permits the escheating State to protect the interest of a creditor last known to have resided there. Reasoning that "debts owed by" a holder of unclaimed funds "are not property to it, but rather a liability," we concluded that "it would be strange to convert a liability into an asset when the State decides to escheat." 379 U. S., at 680. Cognizant of the creditor's status as owner of intangible personal property, we awarded the primary right to escheat to the creditor's State. Conversely, when a creditor's last known address cannot be determined or the laws of the creditor's State do not provide for escheat, the secondary rule protects the interests of the debtor's State as sovereign over the remaining party to the underlying transaction. Unless we define the terms "creditor" and "debtor" according to positive law, we might "permit intangible property rights to be cut off or adversely affected by state action . . . in a forum having no continuing relationship to any of the parties to the proceedings." *Pennsylvania, supra,* at 213 (internal quotation marks omitted). Cf. *Connecticut Mut. Life Ins. Co.* v. *Moore,* 333 U. S. 541, 549–550 (1948) (upholding New York's escheat of unclaimed insurance benefits only "as to policies issued for delivery in New York upon the lives of persons then resident therein where the insured continues to be a resident and the beneficiary is a resident at . . . maturity"). *Texas* and *Pennsylvania* avoided this conundrum by resolving escheat disputes according to the law that creates debtor-creditor relationships; only a State with a clear connection to the creditor or the debtor may escheat. Because the Master failed to identify the relevant "creditors" and "debtors" by reference to that law, we now perform this task.

We hold that intermediaries who hold unclaimed securities distributions in their own name are the relevant "debtors" under the secondary rule of *Texas* and *Pennsylvania.* From an issuer's perspective, the only creditors are registered shareholders, those whose names appear on the issuer's records. Issuers cannot be considered debtors once they pay dividends, interest, or other distributions to record owners; payment to a record owner discharges all of an issuer's obligations. Under § 8–207(1) of the Uniform Commercial Code, which is the law of all 50 States and the District of Columbia, "the issuer . . . may treat the registered owner as the person exclusively . . . to exercise all the rights and powers of an owner." Payment to an intermediary that is the record owner of securities extinguishes any liability the issuer might have to the beneficial owner. U. C. C. §8–207, comment 1, 2C U. L. A. 341 (1991). The Master acknowledged as much, see Report of Special Master 25, and none of the parties contends otherwise. Instead, an intermediary serving as the record owner of securities is the "debtor" insofar as the intermediary has a contractual duty to transmit distributions to the beneficial owner. Unlike an issuer, which discharges all liabilities upon payment to a record owner, an intermediary remains liable should a "lost" beneficial owner reappear to collect distributions due under a contract with the intermediary. The Master thus erred in equating intermediary banks, brokers, and depositories with the issuers' paying agents, who owe no duty to beneficial owners but rather bear the contractual obligation to "return . . . unclaimed distributions to the issuer after a certain period of time." App. to Report of Special Master B–6. Intermediaries who hold securities in street name or nominee name are the relevant "debtors" because they alone, and not the issuers, are legally obligated to deliver unclaimed securities distributions to the beneficial owners.

B

The Master's recommended disposition of this case rested on a second major premise: his proposal to locate a corporate debtor in "the jurisdiction of the entity's principal domestic executive offices rather than the state of incorporation." Report of Special Master 49 (footnote omitted). In *Texas* and *Pennsylvania*, however, we explicitly granted the right to escheat under the secondary rule to the State in which the debtor was incorporated. *Texas, supra,* at 682; *Pennsylvania, supra,* at 210–211, 212, 223–224. By the Master's own admission, relying on the location of a debtor's principal executive offices "change[s] [this Court's] longstanding practice." Report of Special Master 50. The Master proposed this innovation *sua sponte;* no party sought this alteration of our settled law. Delaware excepts to this "[d]epart[ure] from the rule of corporate domicile" as "inconsistent not only with this Court's precedents, but with fundamental principles of jurisprudence defining the relationship between the sovereign and its corporate citizens." Exceptions and Brief for Plaintiff Delaware E–4 to E–5. Finding that the "heavy burden" that attends a request "to reconsider not one but two prior decisions" has not been borne, *Walker* v. *Armco Steel Corp.*, 446 U. S. 740, 749 (1980), we sustain Delaware's exception.

In *Texas,* we considered and rejected a proposal to award the *primary* right to escheat to the State "where [the debtor's] principal offices are located." 379 U. S., at 680. Although we recognized that "this State is probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence," we rejected the rule because its application "would raise in every case the sometimes difficult question of where a company's 'main office' or 'principal place of business' or whatever it might be designated is located." *Ibid.* Even when we formulated the *secondary* rule, we looked instead to the debtor's State of incorporation. *Id.*, at 682. As in *Texas,* we find that determining the State of incorporation is the most efficient way to locate a corporate debtor. Exclusive reliance on incorporation permits the disposition of claims under the secondary rule upon the taking of judicial notice. Although "a general inquiry into where the principal executive office is located [may] see[m] neither burdensome [n]or complex," Report of Special Master 49, we cannot embrace a "rule leaving so much for decision on a case-by-case basis," *Texas, supra,* at 680. The mere introduction of any factual controversy over the location of a debtor's principal executive offices needlessly complicates an inquiry made irreducibly simple by *Texas'* adoption of a test based on the State of incorporation.

Even if we were to endorse the Master's redefinition of a debtor's location, we doubt that his proposal could fulfill its promise "to distribute the funds [more] fairly among the various jurisdictions." Report of Special Master 50. The Master sought to counteract the inequity he perceived in the happenstance that "the larger, publicly-traded, enterprises that generate the lion's share of the securities distributions . . . are by any standard disproportionately incorporated in one state." *Id.*, at 47. His "principal executive offices" initiative, however, cannot survive independent of his erroneous decision to treat the issuers as the relevant "debtors." Because we have already decided that the intermediaries are the proper debtors under the secondary rule, this change would simply transfer the bulk of the disputed funds from Delaware, where many intermediaries are incorporated, to New York, where many intermediaries have located their principal executive offices. A company's arguably arbitrary decision to incorporate in one State bears no less on its business activities than its officers' equally arbitrary decision to locate their principal executive offices in another State. It must be remembered that we refer to a debtor's State of incorporation only when the creditor's last address is unknown or when the creditor's State does not provide for escheat. When the creditor's State cannot assert its predominant interest, we detect no inequity in rewarding a State whose laws prove more attractive to firms that wish to incorporate.

Precedent, efficiency, and equity all dictate the rejection of the Master's "principal executive offices" proposal. We accordingly adhere to *Texas* and *Pennsylvania* and award the right to escheat under the secondary rule to the State in which the debtor is incorporated.

IV

We turn, finally, to New York's contention that many of the disputed funds need not be escheated under the secondary rule at all. New York concedes that "the creditors of unclaimed distributions" held by depositories and custodian banks "are always unknown." Exceptions of Defendant New York 81. It argues, however, that "reconstruct[ion]" of "the debtor *brokers'* transactions" will lead to "creditor brokers that purchased the underlying securities and were underpaid the distributions." *Id.*, at 80 (emphasis added). Because "the amount of time and resources that would be required to reconstruct the overpayment transactions would be very considerable," however, New York "has suggested the use of statistical sampling to prove that virtually all of the creditor brokers and banks recorded on the books of debtor brokers in New York have New York addresses." *Ibid.*

We overrule New York's exception. As an initial matter, New York's proposal rests on the dubious supposition that the relevant "creditors" under the primary rule are other brokers. We have already held that "creditors" are the parties to whom the intermediaries are contractually obligated to deliver unclaimed securities distributions. Accordingly, to the extent that beneficial owners are the relevant "creditors," New York's exception is inapposite.

Even if we indulge New York's premise that most creditors of New York brokers are in fact other New York brokers, the exception must fail. As the Master correctly observed: "[N]othing in the Court's jurisprudence . . . suggest[s] that New York can prevail by making a statistical showing that 'most' [creditor-brokers'] addresses are in New York." Report of Special Master 67. In *Pennsylvania*, we rejected a proposal practically identical to New York's. In that case, because Western Union's records frequently did not disclose a creditor's identity or last known address, the debtor's State of incorporation stood to "receive a much larger share of the unclaimed funds" under the secondary rule. 407 U. S., at 214. The plaintiff States urged us to define the creditor's residence according to a "presumption based on the place of purchase." *Ibid.* Like New York's proposal, the rule advocated in *Pennsylvania* would use a statistical surrogate instead of the debtor's records to locate the last known addresses of creditors. That much is clear from the *Pennsylvania* dissent's description of the rejected rule as "a reasonable approximation." *Id.*, at 221 (opinion of Powell, J.). New York may object to the cost and difficulty of culling creditors' last known addresses from brokers' records,[12] but in *Pennsylvania*, we expressly refused "to vary the application of the [primary] rule according to the adequacy of the debtor's records." *Id.*, at 215. And we decline to do so here.

Despite our refusal to adopt New York's proposal for statistical analysis of creditors' addresses under the primary rule, we decline Delaware's invitation to enter judgment against New York on the basis of the Master's findings. Exceptions and Brief for Plaintiff Delaware 85. On remand, if New York can establish by reference to debtors' records that the creditors who were owed particular securities distributions had last known addresses in New York, New York's right to escheat under the primary rule will supersede Delaware's right under the secondary rule. As we noted in *Texas*, "the State of corporate domicile should be allowed to . . . retai[n] the property for itself only until some other State comes forward with proof that it has a superior right to escheat." 379 U. S., at 682. Accord, *Pennsylvania*, 407 U. S., at 210–211. If New York or any other claimant State fails to offer such proof on a transaction-by-transaction basis or to provide some other proper mechanism for ascertaining creditors' last known addresses, the creditor's State will not prevail under the primary rule, and the secondary rule will control. *Id.*, at 215.

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[12] New York and other States could have anticipated and prevented some of the difficulties stemming from incomplete debtor records, for nothing in our decisions "prohibits the States from requiring [debtors] to keep adequate address records." *Pennsylvania*, 407 U. S., at 215.

V

Only by adhering to our precedent can we resolve escheat disputes between States in a fair and efficient manner. We have repeatedly declared our unwillingness "either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." *Texas, supra,* at 679. Accord, *Pennsylvania, supra,* at 215. To craft different rules for the novel facts of each case would generate "so much uncertainty and threaten so much expensive litigation that the States might find that they would lose more in litigation expenses than they might gain in escheats." *Texas, supra,* at 679. If the States are dissatisfied with the outcome of a particular case, they may air their grievances before Congress. That body may reallocate abandoned property among the States without regard to this Court's interstate escheat rules. Congress overrode *Pennsylvania* by passing a specific statute concerning abandoned money orders and traveler's checks, §§601–603, 88 Stat. 1525, 12 U. S. C. §§2501–2503, and it may ultimately settle this dispute through similar legislation.

We remand this case to the Master for further proceedings consistent with this opinion and for the preparation of an appropriate decree.

So ordered.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

In my view, the Special Master did no violence to our precedents and has a much superior approach and more equitable result than does the Court. I would overrule all of the exceptions to the Special Master's Report, adopt his recommended findings and conclusions, and issue a decree in accordance therewith.

CONROY *v.* ANISKOFF ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 91–1353. Argued January 11, 1993—Decided March 31, 1993

When petitioner Conroy, an officer in the United States Army, failed to pay local real estate taxes on property he owned in Danforth, Maine, the town acquired the property and sold it. In his suit against the town and the property's purchasers, Conroy claimed that § 525 of the Soldiers' and Sailors' Civil Relief Act of 1940—which provides that the "period of military service" shall not "be included in computing any period . . . provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment"—tolled the redemption period while he was in military service, and federal law therefore prevented the town from acquiring good title to the property. The Maine District Court rejected his claim, holding that the redemption period could not be tolled unless the taxpayer could show that military service resulted in hardship excusing timely legal action, and that it would be absurd and illogical to toll limitations periods for career service personnel who had not been handicapped by their military status. The State Supreme Judicial Court affirmed.

Held: A member of the Armed Services need not show that his military service prejudiced his ability to redeem title to property before he can qualify for the statutory suspension of time. The statutory command in § 525 is unambiguous, unequivocal, and unlimited. There is no support for respondents' argument that when § 525 is read in the context of the entire statute, it implicitly conditions its protection on a demonstration of hardship or prejudice resulting from military service. The statute's complete legislative history confirms a congressional intent to protect all military personnel on active duty, not just those whose lives have been temporarily disrupted by the service. In addition, the statute's comprehensive character indicates that Congress included a prejudice requirement whenever it considered it appropriate to do so, and that its omission of any such requirement in § 525 was deliberate. Finally, both the history of this carefully reticulated statute, and this Court's history of interpreting it, refute any argument that a literal construction of § 525 is so absurd or illogical that Congress could not have intended it. Pp. 514–518.

599 A. 2d 426, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in all but n. 12 of which THOMAS, J., joined. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. 518.

Robert H. Klonoff argued the cause and filed briefs for petitioner.

John F. Manning argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General Bruton, Deputy Solicitor General Wallace, Richard Farber,* and *Bridget M. Rowan.*

Kevin M. Cuddy argued the cause and filed a brief for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.†

The Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, as amended, 50 U. S. C. App. § 501 *et seq.* (1988 ed. and Supp. III) (Act), suspends various civil liabilities of persons in military service. At issue in this case is the provision in § 525 that the "period of military service shall not be included in computing any period . . . provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."[1] The question presented is

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**Lawrence M. Maher* filed a brief for Veterans of Foreign Wars of the United States as *amicus curiae.*

†JUSTICE THOMAS joins all but footnote 12 of the opinion.

[1] The full text of § 525 presently reads as follows:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or whether a member of the Armed Services must show that his military service prejudiced his ability to redeem title to property before he can qualify for the statutory suspension of time.

I

Petitioner is an officer in the United States Army. He was on active duty continuously from 1966 until the time of trial. In 1973, he purchased a parcel of vacant land in the town of Danforth, Maine. He paid taxes on the property for 10 years, but failed to pay the 1984, 1985, and 1986 local real estate taxes.[2] In 1986, following the Maine statutory procedures that authorize it to acquire tax-delinquent real estate, the town sold the property.[3]

In 1987, petitioner brought suit in the Maine District Court against the town and the two purchasers. He claimed that § 525 of the Act tolled the redemption period while he was in military service, and federal law therefore prevented the town from acquiring good title to the property even though the State's statutory procedures had been followed. The trial court rejected the claim. In an unreported opinion, it noted that some courts had construed § 525 literally, but it elected to follow a line of decisions that refused to toll the redemption period unless the taxpayer could show that

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forfeited to enforce any obligation, tax, or assessment." 50 U. S. C. App. § 525 (1988 ed., Supp. III).

[2] He testified that he did not receive tax bills for those years and that his letters asking for tax bills were not answered by the town.

[3] Under Maine law a taxing authority has a lien against real estate until properly assessed taxes are paid. If taxes remain unpaid for 30 days after a notice of lien and demand for payment has been sent to the owner, the tax collector may record a tax lien certificate to create a tax lien mortgage. The taxpayer then has an 18-month period of redemption in which he may recover his property by paying the overdue taxes plus interest and costs. See Me. Rev. Stat. Ann., Tit. 36, §§ 552, 942, 943 (1990). It is stipulated that the required procedures were followed in this case and that the town's title was perfected, unless petitioner's objection based on § 525 requires a different result.

"military service resulted in hardship excusing timely legal action."[4] It agreed with those courts that it would be "absurd and illogical" to toll limitations periods for career service personnel who had not been "handicapped by their military status."[5] The Supreme Judicial Court of Maine affirmed by an equally divided court.[6] We granted certiorari to resolve the conflict in the interpretation of § 525. 505 U. S. 1203 (1992).

II

The statutory command in § 525 is unambiguous, unequivocal, and unlimited. It states that the period of military service "shall not be included" in the computation of "any period now or hereafter provided by any law for the redemption of real property . . . ." Respondents do not dispute the plain meaning of this text. Rather, they argue that when § 525 is read in the context of the entire statute, it implicitly conditions its protection on a demonstration of hardship or prejudice resulting from military service. They make three points in support of this argument: that the history of the Act reveals an intent to provide protection only to those whose lives have been temporarily disrupted by military service; that other provisions of the Act are expressly conditioned on a showing of prejudice; and that a literal interpretation produces illogical and absurd results. Neither separately nor in combination do these points justify a departure from the unambiguous statutory text.

Respondents correctly describe the immediate cause for the statute's enactment in 1940, the year before our entry into World War II. Congress stated its purpose to "expedite the national defense under the emergent conditions which are threatening the peace and security of the United

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[4] Pet. for Cert. 33. The court particularly relied on *Pannell* v. *Continental Can Co.*, 554 F. 2d 216 (CA5 1977); *Bailey* v. *Barranca*, 83 N. M. 90, 488 P. 2d 725 (1971); *King* v. *Zagorski*, 207 So. 2d 61 (Fla. App. 1968).

[5] Pet. for Cert. 34.

[6] *Conroy* v. *Danforth*, 599 A. 2d 426 (1991).

States . . . ." 50 U. S. C. App. § 510. That purpose undoubtedly contemplated the special hardship that military duty imposed on those suddenly drafted into service by the national emergency.[7] Neither that emergency, nor a particular legislative interest in easing sudden transfers from civilian to military status, however, justifies the conclusion that Congress did not intend all members of the Armed Forces, including career personnel, to receive the Act's protections. Indeed, because Congress extended the life of the Act indefinitely in 1948,[8] well after the end of World War II, the complete legislative history confirms a congressional intent to protect all military personnel on active duty, just as the statutory language provides.

Respondents also correctly remind us to "follow the cardinal rule that a statute is to be read as a whole, see *Massachusetts* v. *Morash,* 490 U. S. 107, 115 (1989), since the meaning of statutory language, plain or not, depends on context." *King* v. *St. Vincent's Hospital,* 502 U. S. 215, 221 (1991). But as in *King,* the context of this statute actually supports the conclusion that Congress meant what § 525 says. Several provisions of the statute condition the protection they offer on a showing that military service adversely affected the ability to assert or protect a legal right. To choose one of many examples, § 532(2) authorizes a stay of enforcement of secured obligations unless "the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service."[9] The comprehensive character of the entire statute indicates that Congress included a prejudice requirement whenever it considered it appropriate to do so, and that its omission of any such requirement in § 525 was deliberate.

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[7] Respondents emphasize that the statement of purposes refers to the "'temporary suspension of legal proceedings and transactions.'" Brief for Respondents 8, quoting 50 U. S. C. App. § 510. The length of a suspension that lasts as long as the period of active service is "temporary," however, whether it applies to a short enlistment or a long career.

[8] Section 14 of the Selective Service Act of 1948, 62 Stat. 623, provided that the 1940 Act "shall be applicable to all persons in the armed forces of the United States" until the 1940 Act "is repealed or otherwise terminated by subsequent Act of the Congress."

Finally, both the history of this carefully reticulated statute, and our history of interpreting it, refute any argument that a literal construction of § 525 is so absurd or illogical that Congress could not have intended it. In many respects the 1940 Act was a reenactment of World War I legislation that had, in turn, been modeled after legislation that several States adopted during the Civil War. See *Boone* v. *Lightner*, 319 U. S. 561, 565–569 (1943). The Court had emphasized the comprehensive character and carefully segregated arrangement of the various provisions of the World War I statute in *Ebert* v. *Poston*, 266 U. S. 548, 554 (1925), and it had considered the consequences of requiring a showing of prejudice when it construed the World War II statute in *Boone, supra*. Since we presume that Congress was familiar with those cases,[10] we also assume that Congress considered the decision in *Ebert* to interpret and apply each provision of the Act separately when it temporarily reestablished the law as a whole in 1940, and then considered *Boone*'s analysis of a prejudice requirement when it permanently extended the Act in 1948.

Legislative history confirms that assumption. Since the enactment of the 1918 Act, Congress has expressed its understanding that absolute exemptions might save time or money for service members only at the cost of injuring their own credit, their family's credit, and the domestic economy;[11] it presumably required a showing of prejudice only when it seemed necessary to confer on the service member a genuine benefit. By distinguishing sharply between the two types of protections, Congress unquestionably contemplated the ways that either type of protection would affect both military debtors and their civilian creditors.

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[9] Similar qualifications appear in § 520(4) (applying to the reopening of judgments against an absent service member); §§ 521 and 523 (providing for stays of legal proceedings, attachments, and garnishments); § 526 (regulating interest rates on obligations incurred prior to military service); § 530(3) (covering eviction and distress proceedings); § 531(3) (involving the termination of installment contracts); § 535(1) (involving the assignment of insurance coverage); and § 535(2) (limiting the right to enforce liens for the storage of personal property).

[10] See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979).

The long and consistent history and the structure of this legislation therefore lead us to conclude that—just as the language of § 525 suggests—Congress made a deliberate policy judgment placing a higher value on firmly protecting the service member's redemption rights than on occasionally burdening the tax collection process. Given the limited number of situations in which this precisely structured statute offers such absolute protection, we cannot say that Congress would have found our straightforward interpretation and application of its words either absurd or illogical.[12] If the consequences of that interpretation had been—or prove to be—as unjust as respondents contend, we are confident that Congress would have corrected the injustice—or will do so in the future.

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[11] The House Report on the suspension of suits in the 1918 Act, for example, provided in part:

"The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldier as it is unnecessary. A total suspension for the period of the war of all rights against a soldier defeats its own purpose. In time of war credit is of even more importance than in time of peace, and if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off. No one could be found who would extend them credit." H. R. Rep. No. 181, 65th Cong., 1st Sess., 2–3 (1917).

And Congressman Webb, Chairman of the House Judiciary Committee, stated:

"Manifestly, if this Congress should undertake to pass an arbitrary stay law providing that no creditor should ever sue or bring proceedings against any soldier while in the military service of his country, that would upset business very largely in many parts of the country. In the next place, it would be unfair to the creditor as well as to the soldier. It would disturb the soldier's credit probably in many cases and would deny the right of the creditor to his just debts from a person who was amply able to pay and whose military service did not in the least impair his ability to meet the obligation." 55 Cong. Rec. 7787 (1917). See *Boone* v. *Lightner*, 319 U. S. 561, 566, 567, 568 (1943).

The judgment of the Supreme Judicial Court of Maine is reversed.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

The Court begins its analysis with the observation: "The statutory command in § 525 is unambiguous, unequivocal, and unlimited." *Ante*, at 514. In my view, discussion of that point is where the remainder of the analysis should have ended. Instead, however, the Court feels compelled to demonstrate that its holding is consonant with legislative history, including some dating back to 1917—*a full quarter century* before the provision at issue was enacted. That is not merely a waste of research time and ink; it is a false and disruptive lesson in the law. It says to the bar that even an "unambiguous [and] unequivocal" statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted. This undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers.

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[12] In his 11-page opinion concurring in the judgment, JUSTICE SCALIA suggests that our response to respondents' reliance on legislative history "is not merely a waste of research time and ink," but also "a false and disruptive lesson in the law." *Post*, at 519. His "hapless law clerk," *post*, at 527, has found a good deal of evidence in the legislative history that many provisions of this statute were intended to confer discretion on trial judges. That, of course, is precisely our point: It is reasonable to conclude that Congress intended to authorize such discretion when it expressly provided for it and to deny such discretion when it did not. A jurisprudence that confines a court's inquiry to the "law as it is passed," and is wholly unconcerned about "the intentions of legislators," *post*, at 519, would enforce an unambiguous statutory text even when it produces manifestly unintended and profoundly unwise consequences. Respondents have argued that this is such a case. We disagree. JUSTICE SCALIA, however, is apparently willing to assume that this is such a case, but would nevertheless conclude that we have a duty to enforce the statute as written even if fully convinced that every Member of the enacting Congress, as well as the President who signed the Act, intended a different result. Again, we disagree. See *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 610, n. 4 (1991).

The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself* . . . ." *Aldridge* v. *Williams*, 3 How. 9, 24 (emphasis added). But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history. And the present case nicely proves that point.

Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends. If I may pursue that metaphor: The legislative history of § 205 of the Soldiers' and Sailors' Civil Relief Act[1] contains a variety of diverse personages, a selected few of whom—its "friends"—the Court has introduced to us in support of its result. But there are many other faces in the crowd, most of which, I think, are set against today's result.

I will limit my exposition of the legislative history to the enactment of four statutes:

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[1] The Court refers to this section as "§ 525," which corresponds to the unofficial codification of the section in the United States Code, 50 U. S. C. App. § 525. I find it more convenient to use the actual statutory section number—"§ 205"—in discussing the history of the provision.

1. The Soldiers' and Sailors' Civil Relief Act of 1918 (1918 Act), 40 Stat. 440;
2. The Soldiers' and Sailors' Civil Relief Act of 1940 (1940 Act or Act), 54 Stat. 1178;
3. The Soldiers' and Sailors' Civil Relief Act Amendments of 1942 (1942 Amendments), 56 Stat. 769;
4. The Selective Service Act of 1948, 62 Stat. 604.

That, of course, cannot be said to be the "*complete* legislative history" relevant to this provision. Cf. *ante*, at 515. One of the problems with legislative history is that it is inherently open ended. In this case, for example, one could go back further in time to examine the Civil War-era relief Acts, many of which are in fact set forth in an appendix to the House Report on the 1918 Act, see App. A, H. R. Rep. No. 181, 65th Cong., 1st Sess., 18–32 (1917) (hereinafter 1917 House Report). Or one could extend the search abroad and consider the various foreign statutes that were mentioned in that same House Report. See *id.*, at 4, 13–14 (discussing English and French enactments). Those additional statutes might be of questionable relevance, but then so too are the 1918 Act and the 1940 Act, neither of which contained a provision governing redemption periods. Nevertheless, I will limit my legislative history inquiry to those four statutes for the simple reason that that is the scope chosen by the Court.

The 1918 Act appears to have been the first comprehensive national soldiers' relief Act. See 55 Cong. Rec. 7787 (1917). The legislative history reveals that Congress intended[2] that it serve the same vital purpose—providing "protection against suit to men in military service"—as various state statutes had served during the Civil War. 1917 House Report 3; see also *id.*, at 18–32 (App. A) (setting forth text of numerous state soldiers' relief Acts from the Civil War era). Congress intended, however, that the 1918 Act should differ from the Civil War statutes "in two material respects." 55 Cong. Rec. 7787 (1917) (statement of Rep. Webb). The first was that, being a national statute, it would produce a disposition "uniform throughout the Nation." 1917 House Report 3; see also 55 Cong. Rec. 7787 (1917) (statement of Rep. Webb). But it is the second difference which has particular relevance to the Court's ruling today:

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[2] When I say "Congress intended," here and hereafter in this excursus into legislative history, I am speaking as legislative historians speak, attributing to all Members of both Houses of Congress (or at least to a majority of the Members of each House), and to the President (or, if the President did not sign the bill in question, then to at least two-thirds of the Members of both Houses of Congress) views expressed by the particular personage, or committee of personages, whose statements are being described—in the case of the citation at issue in this sentence, a committee of the House of Representatives. It is to be assumed—by a sort of sus-

> "The next material difference between this law and the various State laws is this, and in this I think you will find the chief excellence of the bill which we propose: Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the discretion as to dealing out even-handed justice between the creditor and the soldier, taking into consideration the fact that the soldier has been called to his country's cause, rests largely, and in some cases entirely, in the breast of the judge who tries the case." *Id.*, at 7787 (statement of Rep. Webb).[3]

This comment cannot be dismissed as the passing remark of an insignificant Member, since the speaker was the Chairman of the House Judiciary Committee, the committee that re-

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pension of disbelief—that two-thirds of the Members of both Houses of Congress (or a majority plus the President) were aware of those statements and must have agreed with them; or perhaps it is to be assumed—by a sort of suspension of the Constitution—that Congress delegated to that personage or personages the authority to say what its laws mean.

[3] In quoting this floor statement, I follow the convention of legislative history, which is to assume conclusively that statements recorded in the Congressional Record were in fact made. That assumption of course does not accord with reality. See 117 Cong. Rec. 36506–36507 (1971) (supposed floor statement shown by internal evidence never to have been delivered).

ported the bill to the House floor. Moreover, his remarks merely echoed the House Report, which barely a page into its text stated: "We cannot point out too soon, or too emphatically, that the bill is not an inflexible stay of all claims against persons in military service." 1917 House Report 2. Congress intended to depart from the "arbitrary and rigid protection" that had been provided under the Civil War-era stay laws, *ibid.*, which could give protection to men "who can and should pay their obligations in full," *id.*, at 3. It is clear, therefore, that in the 1918 Act Congress intended to create flexible rules that would permit denial of protection to members of the military who could show no hardship.

The 1918 Act expired by its own terms six months after the end of the First World War. See 1918 Act, § 603, 40 Stat. 449. The 1940 Act was adopted as the Nation prepared for its coming participation in the Second World War. Both the House and Senate Reports described it as being, "in substance, identical with the [1918 Act]." H. R. Rep. No. 3001, 76th Cong., 3d Sess., 3 (1940); S. Rep. No. 2109, 76 Cong., 3d Sess., 4 (1940). Moreover, in *Boone* v. *Lightner*, 319 U. S. 561, 565 (1943), we acknowledged that the 1940 Act was "a substantial reenactment" of the 1918 Act, and looked to the legislative history of the 1918 Act for indications of congressional intent with respect to the 1940 Act. Relying on that legislative history, we found that "the very heart of the policy of the Act" was to provide "judicial discretion . . . instead of rigid and undiscriminating suspension of civil proceedings." *Ibid.*

Although the Court never mentions this fact, it is clear that under the 1918 and 1940 Acts a redemption period would not be tolled during the period of military service. In both enactments, § 205 governed only statutes of limitations and did not mention redemption periods.[4] Moreover, in

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[4] Section 205 of the 1918 Act provided:

"That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of

Ebert v. *Poston,* 266 U. S. 548 (1925), this Court held that neither § 205 nor § 302, which provides protection from foreclosures, conferred on a court any power to extend a statutory redemption period. Congress overturned the rule of *Ebert* in the 1942 Amendments, a central part of the legislative history that the Court curiously fails to discuss. Section 5 of those amendments rewrote § 205 of the Act to place it in its current form, which directly addresses the redemption periods. See 56 Stat. 770–771; *ante,* at 512–513, n. 1 (setting forth current version of § 205). The crucial question in the present case (if one believes in legislative history) is whether Congress intended this amendment to be consistent with the "heart of the policy of the Act"—conferring judicial discretion—or rather intended it to confer an unqualified right to extend the period of redemption. Both the House and Senate Reports state that, under the amended § 205, "[t]he running of the statutory period during which real property may be redeemed after sale to enforce any obligation, tax, or assessment is *likewise* tolled during the part of such period which occurs after the enactment of the [1942 Amendments]." H. R. Rep. No. 2198, 77th Cong., 2d Sess., 3–4 (1942) (emphasis added); S. Rep. No. 1558, 77th Cong., 2d Sess., 4 (1942) (emphasis added). The Reports also state that "[a]lthough the tolling of such periods is now within the spirit of the law, it has not been held to be within the letter thereof" (citing *Ebert*). H. R. Rep. No. 2198, *supra,* at 4; S. Rep. No. 1558, *supra,* at 4. These statements surely indicate an intention to provide a tolling period for redemptions similar to that already provided for statutes of limitations—which, on the basis of the legislative history I have de-

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any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service." 40 Stat. 443.

Section 205 of the 1940 Act was identical, except that the word "That" at the beginning of the section was omitted.

scribed, can be considered discretionary rather than rigid. The existence of discretionary authority to suspend the tolling is also suggested by the House floor debates. Responding to questions, Representative Sparkman (who submitted the Report on behalf of the House Committee on Military Affairs) agreed that, while the bill "pertains to all persons in the armed forces," a man "serving in the armed forces for more money than he got in civil life . . . is not entitled to any of the benefits of the provisions of this bill." 88 Cong. Rec. 5364, 5365 (1942). In response to that last comment, another Representative inquired further whether "[t]his is to take care of the men who are handicapped because of their military service." *Id.*, at 5365. Representative Sparkman answered affirmatively. *Ibid.* He confirmed that Congress did not intend to abandon the discretionary nature of the scheme: "With reference to all these matters we have tried to make the law flexible by lodging discretion within the courts to do or not to do as justice and equity may require." *Ibid.* And finally, at a later point in the debates, Representative Brooks made clear that the Act was intended to remedy the prejudice resulting from compelled military service: "We feel that the normal obligations of the man contracted prior to service induction should be suspended as far as practicable during this tour of duty, and that the soldier should be protected from default in his obligations due to his inability to pay caused by reduction in income due to service." *Id.*, at 5369.

The final component of the legislative history that I shall treat is the extension of the 1940 Act in the Selective Service Act of 1948, 62 Stat. 604. The Court misconstrues Congress's intent in this enactment in two respects. First, it asserts that "because Congress extended the life of the Act indefinitely in 1948, well after the end of World War II, the complete legislative history confirms a congressional intent to protect all military personnel on active duty, just as the statutory language provides." *Ante*, at 515 (footnote omitted). It is true enough that the War was over; but the draft was not. The extension of the 1940 Act was contained in the *Selective Service Act of 1948*, which *required* military service from citizens. And it would appear to have been contemplated that the "life of the Act" would be extended not "indefinitely," as the Court says, *ibid.*, but for the duration of the draft. See H. R. Rep. No. 1881, 80th Cong., 2d Sess., 12 (1948) (extension was intended to "continu[e] the Soldiers' and Sailors' Civil Relief Act of 1940 in its application to the personnel inducted or entering the armed forces during the life of this act"). The legislative history states that Congress intended to extend the provisions of the 1940 Act "to persons serving in the armed forces *pursuant to this act.*" S. Rep. No. 1268, 80th Cong., 2d Sess., 21 (1948) (emphasis added). Career members of the military such as petitioner would not have been serving "pursuant to" the Selective Service Act, since they were expressly excepted from its service requirement. See Selective Service Act of 1948 § 6(a), 62 Stat. 609. In this focus upon draftees, the legislative history of the 1948 extension merely replicates that of the 1940 Act and the 1942 Amendments. The former was enacted on the heels of the Selective Training and Service Act of 1940, 54 Stat. 885, and was introduced on the Senate floor with the explanation that it would provide "relief . . . to those who are to be *inducted* into the military service for training under [the Selective Training and Service Act of 1940]." 86 Cong. Rec. 10292 (1940) (statement of Rep. Overton) (emphasis added). In the debate on the 1942 Amendments, Representative Sparkman noted that "hundreds of thousands, and even millions, have been called" into military service since the enactment of the 1940 Act, and admonished his colleagues to "keep uppermost in your mind at all times the fact that the primary purpose of this legislation is to give relief to the boy that is called into service." 88 Cong. Rec. 5364 (1942). In other words, the legislative history of the 1948 extension, like that of the Act itself and of the 1942 Amendments, suggests an intent to protect those who were *prejudiced* by military service, as many who were drafted would be.

The Court also errs in mistaking the probable effect of Congress's presumed awareness of our earlier opinions in *Ebert* and *Boone*. See *ante*, at 516. In *Boone*, we stated that the Act "is always to be liberally construed to protect those who have been *obliged* to drop their own affairs to take up the burdens of the nation," 319 U. S., at 575 (emphasis added), but that discretion was vested in the courts to ensure that the immunities of the Act are not put to "unworthy use," *ibid.*, since "the very heart of the policy of the Act" was to provide "judicial discretion . . . instead of rigid and undiscriminating suspension of civil proceedings," *id.*, at 565. Awareness of *Boone* would likely have caused Congress to assume that the courts would *vindicate* "the very heart of the policy of the Act" by requiring a showing of prejudice. The Court argues, however, that Congress would *also* have been aware that *Ebert* recognized the "carefully segregated arrangement of the various provisions" of the Act, *ante*, at 516. It is already an extension of the normal convention to assume that Congress was aware of the precise reasoning (as opposed to the holding) of earlier judicial opinions; but it goes much further to assume that Congress not only knew, but expected the courts would continue to follow, the reasoning of a case *(Ebert)* whose holding Congress had repudiated six years earlier. See *supra*, at 523. In any event, the Court seeks to use *Ebert* only to establish that Congress was aware that this Court was aware of the "carefully segregated arrangement" of the Act. That adds little, if anything, to direct reliance upon the plain language of the statute.

After reading the above described legislative history, one might well conclude that the result reached by the Court today, though faithful to law, betrays the congressional intent. Many have done so. Indeed, as far as I am aware, *every court* that has chosen to interpret § 205 in light of its legislative history rather than on the basis of its plain text has found that Congress did not intend § 205 to apply to career members of the military who cannot show prejudice or hardship. See, in addition to the court below, *Pannell* v. *Continental Can Co.*, 554 F. 2d 216, 224–225 (CA5 1977); *Bailey* v. *Barranca*, 83 N. M. 90, 94–95, 488 P. 2d 725, 729–730 (1971); *King* v. *Zagorski*, 207 So. 2d 61, 66–67 (Fla. App. 1968). The only scholarly commentary I am aware of addressing this issue concludes: "An examination of the legislative history of the Act shows that the prevailing interpretation of section 205 [*i. e.*, the Court's interpretation] is not consistent with congressional intent." Folk, Tolling of Statutes of Limitations under Section 205 of the Soldiers' and Sailors' Civil Relief Act, 102 Mil. L. Rev. 157, 168 (1983). Finally, even the Government itself, which successfully urged in this case the position we have adopted, until recently believed, on the basis of legislative history, the contrary. See *Townsend* v. *Secretary of Air Force*, No. 90–1168, 1991 U. S. App. LEXIS 26578, *5–*7 (CA4, Nov. 12, 1991); Brief for United States as *Amicus Curiae* 17, n. 19 (filed June 2, 1992) (noting Government's position in *Townsend* that § 205 requires a showing of prejudice); see also *Bickford* v. *United States*, 656 F. 2d 636, 640 (Ct. Cl. 1981) ("The Government argues that the statute does not mean what it says because the legislative history evinces Congress' intent to limit the applicability of [§ 205] to those servicemen engaged in battle or who are otherwise handicapped from asserting their legal claims").

I confess that I have not personally investigated the entire legislative history—or even that portion of it which relates to the four statutes listed above. The excerpts I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task. The other Justices have, in the aggregate, many more law clerks than I, and it is quite possible that if they all were unleashed upon this enterprise they would discover, in the legislative materials dating back to

1917 *or earlier*, many faces friendly to the Court's holding. Whether they would or not makes no difference to me—and evidently makes no difference to the Court, which gives lip-service to legislative history but does not trouble to set forth and discuss the foregoing material that others found so persuasive. In my view, that is as it should be, except for the lipservice. The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it. We should not pretend to care about legislative intent (as opposed to the meaning of the law), lest we impose upon the practicing bar and their clients obligations that we do not ourselves take seriously.

UNITED STATES ET AL. *v.* TEXAS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91–1729. Argued March 1, 1993—Decided April 5, 1993

States participating in the Food Stamp Program receive from the United States Department of Agriculture coupons that they distribute to qualified individuals and households. If they distribute the coupons through the mail, they must reimburse the Federal Government for part of the replacement cost for any coupons that are lost or stolen. Texas, which contractually bound itself to comply with all federal regulations governing the program, incurred substantial mail issuance losses and was informed that prejudgment interest would begin to accrue on its debt unless payment was made within 30 days. After being denied administrative relief, Texas filed suit against the United States, arguing, *inter alia,* that the Debt Collection Act of 1982 (Act) abrogated the United States' common-law right to collect prejudgment interest on debts owed to it by the States. The District Court granted summary judgment in favor of the United States, but the Court of Appeals reversed.

Held: The Act left in place the States' federal common-law obligation to pay prejudgment interest on debts owed to the Federal Government. Pp. 533–539.

(a) It is a longstanding rule that a party owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money. Also longstanding is the principle that statutes invading the common law are to be read with a presumption favoring retention of existing law except when a statutory purpose to the contrary is evident. This presumption is not limited to state common law or federal maritime law. Pp. 533–534.

(b) The Act is silent as to the States' obligations to pay prejudgment interest. That the Act applies only to debts owed by a "person" establishes only Congress' intent to exempt the States from the obligation to pay interest in accordance with the Act's mandatory provisions, not an intent to relieve them of their common-law obligation. Given the differences between the Act—which *requires* federal agencies to collect prejudgment interest at a preestablished rate—and the common law—which gives federal courts flexibility in determining whether to impose interest and the appropriate rate—it is logical to conclude that the Act was intended to reach only private debtors and to leave the States alone. The Act's purpose—to enhance the Government's debt collection ability—reinforces this reading of its plain language. Texas' proposed reading, however, would give delinquent States less incentive to pay their debts. Neither the fact that the Food Stamp Act has a mechanism to collect debts nor the fact that Congress did not see the States as the root of the debt collection problem when it passed the Debt Collection Act indicates that Congress meant to relieve the States of their common-law obligation. Texas incorrectly argues that the reimbursement requirement is not subject to prejudgment interest because it is a penalty rather than a contractual obligation. *Rodgers* v. *United States*, 332 U. S. 371, 374–376, distinguished. Pp. 534–539.

951 F. 2d 645, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 539.

Thomas G. Hungar argued the cause for petitioners. With him on the briefs were *Solicitor General Starr, Acting Solicitor General Bryson, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, William Kanter*, and *Bruce G. Forrest.*

James C. Todd argued the cause for respondents. With him on the brief were *Dan Morales*, Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, *Edwin N. Horne* and *Christopher Johnsen*, Assistant Attorneys General, and *Jorge Vega.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we decide the question left open in *West Virginia* v. *United States*, 479 U. S. 305, 312–313, n. 5 (1987): whether Congress intended the Debt Collection Act of 1982 to abrogate the United States' federal common-law right to collect prejudgment interest on debts owed to it by the States. We hold that it did not.

Texas incurred the instant debts as a result of participation in the Food Stamp Program, 78 Stat. 703, as amended, 7 U. S. C. §2011 *et seq.* Under that program, the Food and Nutrition Service (FNS) of the United States Department of Agriculture provides food stamp coupons to participating States, and the States then distribute the coupons to qualified individuals and households. §§2013(a), 2014. Regulations implementing the Food Stamp Program permit participating States to distribute the coupons either over the counter or through the mail. 7 CFR §274.3(a) (1986); 7 CFR §274.3(a)(3) (1992). While mail issuance generally is cheaper and more convenient, States that choose to use that distribution method must reimburse the Federal Government for a portion of the replacement cost for any lost or stolen coupons. 7 U. S. C. §2016(f). Specifically, a State must reimburse the Government for all such losses above a "tolerance level" set by regulation.[1]

Texas, through its Department of Human Services, contractually bound itself to comply with all federal regulations governing the program. See 7 CFR §§272.2(a)(2), 272.2(b)(1) (1986).[2] Texas incurred substantial mail issuance

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[1] The regulatory tolerance level in place for the mail issuance losses in this case was 0.5% of each reporting area's total mail issuances for each calendar quarter. 7 CFR §274.3(c)(4)(i) (1986).

[2] Title 7 CFR §272.2(a)(2) (1992) provides in pertinent part:

"The basic components of the State Plan of Operation are the Federal/State Agreement, the Budget Projection Statement, and the Program Activity Statement.... The Federal/State Agreement is the legal agreement between the State and the Department of Agriculture. This Agreement is the means by which the State elects to operate the Food Stamp Program and to administer the program in accordance with the Food Stamp Act of 1977, as amended, regulations issued pursuant to the Act and the FNS-approved State Plan of Operations."

Subsection (b)(1) sets out the exact wording of the preprinted Federal/State Agreement. The provisions relevant to this dispute are as follows:

"The State of —— and the Food and Nutrition Service (FNS), U. S. Department of Agriculture (USDA), hereby agree to act in accordance with the provisions of the Food Stamp Act of 1977, as amended, implementing regulations and the FNS-approved State Plan of Operation. The State losses, in part because United States Postal employees stole food stamps that had been mailed by the Texas Department of Human Services to qualified households. Because those losses exceeded the applicable tolerance level, Texas was bound to reimburse the Federal Government for the excess losses. The FNS notified Texas of its debt in the amount of $412,385, and informed it that prejudgment interest would begin to accrue on the balance unless payment was made within 30 days.

Texas sought administrative relief in the form of a waiver of liability. After the Food Stamp Appeals Board denied the requested relief, Texas sued the United States in the United States District Court for the Western District of Texas. In addition to challenging the Appeals Board's refusal to grant a waiver of liability, Texas argued that the Debt Collection Act precluded the imposition of prejudgment interest on any amount it owed the Federal Government. The District Court granted summary judgment in favor of the United States on both issues. With respect to the prejudgment interest issue, the District Court adopted the approach taken by the Court of Appeals for the Tenth Circuit in *Gallegos* v. *Lyng*, 891 F. 2d 788 (1989), which held that the Government's common-law right to prejudgment interest on debts owed to it by the States survived enactment of the Debt Collection Act. See Civ. Action Nos. A–87–CA–774, A–88–CA–820 (WD Tex., Nov. 13, 1990).

The Court of Appeals for the Fifth Circuit affirmed the District Court's decision concerning waiver, but reversed its

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and FNS (USDA) further agree to fully comply with any changes in Federal law and regulations. This agreement may be modified with the mutual written consent of both parties.

. . . . .

"The State agrees to: 1. Administer the program in accordance with the provisions contained in the Food Stamp Act of 1977, as amended, and in the manner prescribed by regulations issued pursuant to the Act; and to implement the FNS-approved State Plan of Operation." 7 CFR §272.2(b)(1) (1992).

decision concerning prejudgment interest. 951 F. 2d 645 (1992). Relying on the language of the Debt Collection Act, the court held that the "Act is not silent concerning whether or not state obligations should be subject to prejudgment interest. The Act specifically excludes states from the payment of interest." *Id.*, at 651. Because Congress did not impose interest through the specific provisions of the Food Stamp Act "during the time period relevant in this case, the Courts are not free to 'supplement' Congress' enactment." *Ibid.* (quoting *Mobil Oil Corp.* v. *Higginbotham,* 436 U. S. 618, 625 (1978)). The court rejected the argument that abrogation is inconsistent with the Act's purpose of enhancing the Government's ability to collect its debts. In the court's view, the Federal Government could enforce its claims for unpaid mail issuance losses through the offset procedures built into the Food Stamp Act. Because of a split among the Courts of Appeals on this question, we granted certiorari, 506 U. S. 813 (1992), and now reverse.[3]

It is a "longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money." *West Virginia* v. *United States,* 479 U. S., at 310 (citing *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 295–297 (1941)). In *Board of Comm'rs of Jackson County* v. *United States,* 308 U. S. 343 (1939), we held that this common-law right extends to debts owed by state and local governments, but cautioned that a federal court considering the question in an individual case should weigh the federal and state interests involved. We reaffirmed *Board of*

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[3] The Tenth Circuit holds that the Debt Collection Act of 1982 did not abrogate the Federal Government's common-law right to collect prejudgment interest against the States. *Gallegos* v. *Lyng,* 891 F. 2d 788 (1989). The Second, Third, and Eighth Circuits all hold to the contrary. See *Perales* v. *United States,* 751 F. 2d 95 (CA2 1984) *(per curiam); Pennsylvania Dept. of Public Welfare* v. *United States,* 781 F. 2d 334 (CA3 1986); *Arkansas by Scott* v. *Block,* 825 F. 2d 1254 (CA8 1987).

Comm'rs in *West Virginia, supra,* and upheld the assessment of prejudgment interest on a debt owed by West Virginia to the United States.

Just as longstanding is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 783 (1952); *Astoria Federal Savings & Loan Assn.* v. *Solimino,* 501 U. S. 104, 108 (1991). In such cases, Congress does not write upon a clean slate. *Astoria, supra,* at 108. In order to abrogate a common-law principle, the statute must "speak directly" to the question addressed by the common law. *Mobil Oil Corp.* v. *Higginbotham, supra,* at 625; *Milwaukee* v. *Illinois,* 451 U. S. 304, 315 (1981).

Texas argues that this presumption favoring retention of existing law is appropriate only with respect to state common law or federal maritime law. Although a different standard applies when analyzing the effect of federal legislation on state law, *id.,* at 316–317, there is no support in our cases for the proposition that the presumption has no application to federal common law, or for a distinction between general federal common law and federal maritime law in this regard. We agree with Texas that Congress need not "affirmatively proscribe" the common-law doctrine at issue. Brief for Respondents 3–4; see *Milwaukee, supra,* at 315. But as we stated in *Astoria, supra,* "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except 'when a statutory purpose to the contrary is evident.'" 501 U. S., at 108 (quoting *Isbrandtsen, supra,* at 783).

The Debt Collection Act does not speak directly to the Federal Government's right to collect prejudgment interest on debts owed to it by the States. The Act states that "[t]he head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a

United States Government claim owed by a *person* . . . ." 31 U. S. C. § 3717(a)(1) (emphasis added). Section 3701, in turn, provides that the term "'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government." § 3701(c). Texas argues that this exemption clearly establishes Congress' intent to relieve the States of their common-law obligation to pay prejudgment interest. We disagree.

The only obligation from which § 3701 exempts the States is the obligation to pay prejudgment interest in accordance with the mandatory provisions of the Act. These impose a stringent minimum interest requirement upon private persons owing money to the Federal Government. The statute is silent as to the obligation of the States to pay prejudgment interest on such debts. We agree with the Solicitor General that "Congress's mere refusal to legislate with respect to the prejudgment-interest obligations of state and local governments falls far short of an expression of legislative intent to supplant the existing common law in that area." Brief for Petitioners 16.[4]

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[4] Both Texas and the Court of Appeals rely on Congress' authority to impose interest obligations on the States through specific statutes, such as the Medicaid Act, 42 U. S. C. § 1396b(d)(5), and the Social Security Act, 42 U. S. C. § 418(j) (1982 ed.), to support the proposition that the Debt Collection Act extinguished the Federal Government's common-law right to collect prejudgment interest. Both statutes, however, codified and made mandatory the common-law right to collect prejudgment interest at a specified interest rate. Like the Debt Collection Act, these statutes changed the common law. Congress' obvious desire to enhance the common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations.

Texas also relies on the recent amendment to 7 U. S. C. § 2022 adding a provision requiring prejudgment interest on specific obligations arising under the Food Stamp Act of 1977. Pub. L. 100–435, § 602, 102 Stat. 1674 (1988). But "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990) (quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960)). Texas' argument also fails because, like

Our conclusion that the States remain subject to common-law prejudgment interest liability is supported by the fact that the Debt Collection Act is more onerous than the common law. Section 3717(a) *requires* federal agencies to collect prejudgment interest against persons and specifies the interest rate.[5] The duty to pay prejudgment interest under the common law, however, is by no means automatic. Before imposing prejudgment interest, the courts must weigh the competing federal and state interests. *West Virginia,* 479 U. S., at 309–311; *Board of Comm'rs,* 308 U. S., at 350. And instead of imposing a preestablished rate of interest, the district courts retain discretion to choose the appropriate rate in a given case. Unlike the common law, § 3717 also imposes processing fees and penalty charges, 31 U. S. C. §§ 3717(e)(1), (e)(2). Given these differences, it is logical to conclude that the Act was intended to reach only one subset of potential debtors—persons—and to leave the other subset alone. It is reasonable to apply more stringent requirements to debts owed by private persons and to keep the more flexible common law in place for debts owed by state and local governments.

The evident purpose of the Debt Collection Act reinforces our reading of the plain language. The Act was designed "[t]o increase the efficiency of Government-wide efforts to collect debts owed the United States and to provide additional procedures for the collection of debts owed the United States." 96 Stat. 1749; S. Rep. No. 97–378, p. 2 (1982) (the Act responded to "increasing concern . . . expressed in Con-

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the Medicaid Act and the Social Security Act provisions, the Food Stamp Act of 1977 did not merely codify the common law without change. Rather, it contains a mandatory provision requiring prejudgment interest at a specified rate.

[5] The interest rate required under § 3717 is "the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point." 31 U. S. C. § 3717(a)(1).

gress and elsewhere over the increasing backlog of unpaid debts owed the federal government"). This suggests that Congress passed the Act in order to strengthen the Government's hand in collecting its debts. Yet under the reading proposed by Texas and the Court of Appeals, the Act would have the anomalous effect of placing delinquent States in a position where they had less incentive to pay their debts to the Federal Government than they had prior to its passage.

The Court of Appeals reasoned that the States would not have an incentive to delay payment of their debts because the Food Stamp Act makes state agencies liable for actual losses caused by coupon shortages or unauthorized issuances, and permits the Federal Government to recover these debts through an administrative offset procedure. 951 F. 2d, at 650. But the Debt Collection Act applies to *all* federal agencies, not just the FNS. Thus, the existence of a mechanism in the Food Stamp Act allowing the FNS to collect its debts does nothing to encourage prompt payment of debts governmentwide. That the FNS may have already possessed adequate sanctions to compel payment is not a reason to conclude that the generic language in the Debt Collection Act was meant to abrogate the existing common-law obligation of the States generally.

Texas concedes that Congress intended to enhance the Government's debt collection efforts by passing the Act. It argues, however, that Congress was concerned primarily with debts owed by private persons. Accordingly, runs the argument, Congress meant to relieve the States of their duty to pay interest because the States were not the root of the debt collection problem.

Part of this argument persuades; Congress in the Act tightened the screws, so to speak, on the prejudgment interest obligations of private debtors to the Government, and not on the States. It may be inferred from this fact that the former were the root of the Government's debt collection problems which inspired the Act. But it does not at all follow that because Congress did not tighten the screws on the States, it therefore intended that the screws be entirely removed. The more logical conclusion is that it left the screws in place, untightened.

As a last-ditch argument, Texas contends that its liability for losses in the mail is not a contractual debt for which it owes prejudgment interest, but rather a penalty unilaterally imposed by Congress. See *Rodgers* v. *United States,* 332 U. S. 371, 374–376 (1947) (penalties are not normally subject to prejudgment interest). This argument fails because the obligation of Texas to reimburse the Government for a portion of the stamps lost in the mail is quite different from that involved in *Rodgers.* There the penalties in question were unilaterally imposed by the Agricultural Adjustment Act on farmers who exceeded their production quotas; there was no suggestion that the farmers ever consented to such penalties. Here, on the other hand, Texas signed a Federal/State Agreement, the express terms of which bound the State to act in accordance with the implementing regulations. 7 CFR § 272.2(a)(2) (1986); see also n. 2, *supra.* Thus, 7 CFR § 274.3(c)(4) (1986), which imposed liability for mail issuance losses above a specified tolerance level, was incorporated into Texas' Federal/State Agreement. The requirement that the States reimburse the Federal Government for a certain portion of mail issuance losses is not a penalty, but a contractual obligation which the State assumed.[6]

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[6] Both Texas and the Court of Appeals rely upon our decision in *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981), for the proposition that the Federal Government may not collect prejudgment interest because neither the Debt Collection Act nor the Food Stamp Act expressly require prejudgment interest. This reliance is misplaced. In *Pennhurst,* we held that in order to impose conditions on the receipt of federal funds, Congress must speak unambiguously. *Id.,* at 17. This makes sense because the States cannot voluntarily and knowingly agree to a condition that is not clearly expressed. *Ibid.* Because the duty to pay prejudgment interest on debts owed to the United States existed long before either the Food Stamp Program or the Debt Collection Act was

For these reasons, we hold that the Debt Collection Act left in place the federal common law governing the obligation of the States to pay prejudgment interest on debts owed to the Federal Government.

The judgment of the Court of Appeals to the contrary is accordingly

Reversed.

JUSTICE STEVENS, dissenting.

As the Court correctly notes, the requirement that private parties must pay prejudgment interest on contractual debts owed to the United States is a common-law rule of long standing. *Ante*, at 533. Over a century ago we recognized an equally well-established exception to that rule: The United States is not entitled to recover interest from a State unless the State's consent to pay such interest has been expressed in a statute or binding contract. *United States* v. *North Carolina*, 136 U. S. 211 (1890).[1] The reason for this exception is not any sovereign immunity attributable to a State,[2] but the venerable presumption that a sovereign State is always ready, willing, and able to discharge its obligations promptly.[3]

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created, the rule in *Pennhurst* does not apply. See *Bell* v. *New Jersey*, 461 U. S. 773, 790, n. 17 (1983).

[1] "Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S. 565; *Angarica* v. *Bayard*, 127 U. S. 251, 260, and authorities there collected; *In re Gosman*, 17 Ch. D. 771." *United States* v. *North Carolina*, 136 U. S., at 216.

[2] The individual States retain no sovereign immunity against the Federal Government. *United States* v. *Texas*, 143 U. S. 621 (1892).

[3] "Judgments, it is true, are by the law of South Carolina, as well as by Federal legislation, declared to bear interest. Such legislation, however, has no application to the government. And the interest is no part of the

The presumption that a sovereign State is "always ready to pay what it owes"[4] may well have been just as fictional as the presumption that the King could do no wrong, but it nevertheless was firmly embedded in the common law.[5] Moreover, even today the tradition of according special respect to a sovereign State whenever it is subjected to the coercive powers of judicial tribunals is very much alive. See, *e. g., Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.,* 506 U. S. 139, 146 (1993). The ancient common-law presumption and a continuing recognition of "the importance of ensuring that the State's dignitary interests can be fully vindicated," *ibid.,* best explain why Congress deliberately omitted any provision for the collection of interest from a sovereign State when it enacted the Debt Collection Act in 1982.[6]

The Court is also correct in noting that we are reluctant to infer a legislative abrogation of the common law. *Ante,* at 534. We presume that Congress understands the legal terrain in which it operates, see *Cannon* v. *University of Chicago,* 441 U. S. 677, 698–699 (1979), and we therefore

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amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. *But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes." United States* v. *Sherman,* 98 U. S. 565, 567–568 (1879) (emphasis added). See also *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330, 336 (1920).

[4] See n. 3, *supra.*

[5] See, *e. g., Attorney General* v. *Cape Fear Navigation Co.,* 37 N. C. 444, 454 (1843) ("[T]he general rule is, that the State never pays interest, unless she expressly engages to do so"); *State* v. *Thompson,* 10 Ark. 61 (1849).

[6] Title 31 U. S. C. § 3717(a) requires the appropriate government official to charge interest "on an outstanding debt on a United States Government claim owed by a person," but 31 U. S. C. § 3701(c) provides that for purposes of this section the term "'person' does not include an agency of the United States Government, of a State government, or of a unit of general local government."

expect Congress to state clearly any intent to reshape that terrain. Before we can apply this reluctance to infer legislative abrogations of the common law, however, we must determine what that terrain was—or at least how it might have been perceived—when Congress acted; Congress cannot think it necessary, and we should not expect it, to state clearly an intent to abrogate a common-law rule that does not exist.

When Congress enacted the Debt Collection Act of 1982, the question whether interest might ever be collected from a sovereign State unless explicitly authorized was undecided by this Court. We had never held that the United States could demand prejudgment interest on a debt owed to it by a State. Not until five years later, in *West Virginia* v. *United States*, 479 U. S. 305 (1987), did we hold for the first time that in some circumstances the United States may demand prejudgment interest from the States themselves. The Court therefore rewrites the history of our common law when it predicates its entire analysis of this case on what it creatively describes as "the United States' federal common-law right to collect prejudgment interest on debts owed to it by the States." *Ante*, at 530. Only through hindsight—or by crediting Congress with a prescience as to what the common law *would become*—can the Court find that the 97th Congress did not intend to abrogate a rule that did not then exist.[7] Congress had every reason to think it was writing

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[7] So long as we are going to credit the Congress with a *post hoc* understanding of the common law, we might as well refer to the *post hoc* comments of the author of the amendment, Senator Percy:

"Prior to September 27, 1982, neither Senate bill 1249 nor House bill 4613 contained a provision exempting any entity from the Act. Several interest groups, however, presented the view that sections 10 and 11 of the Act, except in cases where fraud was evident, should not be applied to states or local governments because they constituted a different class of debtor than did private individuals and would suffer great harm if the federal government attempted to assess interest or apply administrative offsets against them. These same concerns had been presented in hear-on a "clean slate," *ante,* at 534, when it decided to exclude the State from its definition of the class of persons who must pay interest on debts to the United States. There was no occasion for Congress to specifically abrogate a principle that it had no reason to think stood in its way.

In *Board of Comm'rs of Jackson County* v. *United States,* 308 U. S. 343 (1939), the Court held that the United States, suing on behalf of a Native American, could *not* recover prejudgment interest from a county even though the county had improperly collected those taxes. While noting that "interest in inter-governmental litigation has no . . . roots in history," *id.,* at 351, the Court did not rule out the possibility that in an unusual case, considerations of fairness might make it appropriate to collect such interest from a state agency, see *id.,* at 352. Only to that small extent, therefore,

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ings before the House Committee on the Judiciary during the House's consideration of the Debt Collection Act of 1981, H. R. 4614.

"In response to these concerns, on September 27, 1982, I proposed an amendment to S. 1249. This amendment, UP amendment 1299, amended provisions in Sections 10 and 11 of the Act, stating that 'the term "person" does not include any agency of the United States, or any state or local government.' This provision effectively took federal agencies, states and local governments out of the Act, but retained sufficient flexibility to permit Congress to legislatively pick and choose according to circumstances, those situations in which the government might assess interest against those entities exempted by the Act. As enacted, the Debt Collection Act of 1982 appears clear on this point. It was not anticipated that federal agencies would attempt to invoke common law authority, which, *if it exists with respect to interest assessment and administrative offset against states and local governments,* was abrogated by sections 10(e)(2) and 11(e)(8) of the Act." Letter of Nov. 21, 1983, from Senator Charles H. Percy to the Comptroller General (emphasis added). See *Texas* v. *United States,* 951 F. 2d 645, 649–650 (CA5 1992); *Pennsylvania Dept. of Public Welfare* v. *United States,* 781 F. 2d 334, 341, n. 10 (CA3 1986). Of course, the significance of a comment by an individual legislator is discounted when made "'after passage of the Act,'" see *Bread Political Action Committee* v. *FEC,* 455 U. S. 577, 582, n. 3 (1982). This Court's use of the 1987 opinion in the *West Virginia* case to describe the state of the common law in 1982 should be similarly discounted.

was any aspect of our decision in *Board of Comm'rs* "reaffirmed," *ante*, at 533, in *West Virginia, supra*.

In fact, in *West Virginia*, we rejected the balancing of equities that *Board of Comm'rs* had suggested might be the only basis for charging a State with prejudgment interest.[8] There, the State of West Virginia had refused to reimburse the Federal Government for costs advanced to it under the Disaster Relief Act of 1970. The Court held that "any rule exempting a sovereign from the payment of prejudgment interest not only does not apply of its own force to the State's obligations to the Federal Government, cf. *Library of Congress* v. *Shaw*, 478 U. S. 310 (1986), but also does not represent a policy the federal courts are obliged to further." 479 U. S., at 311–312 (footnotes omitted). This was the first statement by this Court suggesting that the States might be generally liable for prejudgment interest on the contractual claims brought by the Federal Government. And, even though we came close to saying in *West Virginia* that such interest is generally available, we did not go that far. Even in 1987—five years after the Debt Collection Act was passed—it was not clear to us, to Congress, or to the States that the obligation of a State to pay prejudgment interest to the Government would extend to a typical contract claim.

Thus, even though the Court today suggests that its decision is merely an application of *Board of Comm'rs* and *West Virginia*, it actually takes a significant and independent step toward equating the Government's right to collect prejudgment interest from the States with the Government's right to demand prejudgment interest from *all* private parties in *every* case.[9] Even if such an equation were well advised, which it may well be, it would say nothing about whether Congress had any reason to know in 1982 that the common law was moving in that direction, much less that it had already arrived there. Yet the Court supports today's decision because the 97th Congress did not clearly state its intention to abrogate a rule that we now make clear for the first time.

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[8] "The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. *United States* v. *Sanborn*, 135 U. S. 271, 281; *Billings* v. *United States*, 232 U. S. 261." *Board of Commr's of Jackson County* v. *United States*, 308 U. S. 343, 352 (1939). In 1987 the Court rejected the argument that "whether interest had to be paid depended on a balancing of equities between the parties." *West Virginia* v. *United States*, 479 U. S., at 311, n. 3.

My point, in sum, is not that the States had an absolute common-law immunity from a claim for prejudgment interest in 1982; it is only that the State's *obligation* to pay such interest was so much *less than* a confirmed rule that we cannot say that the 1982 enactment "left [it] in place," *ante,* at 539. "[F]avoring the retention of long-established and familiar principles," *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 783 (1952), does not mean favoring the retention of rules that have not yet fallen into place.

I respectfully dissent.

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[9] Whatever it says about reserving discretion about when interest should be imposed, and at what rate, *ante,* at 536, the Court has tacitly authorized an extension of the rule on which we relied in *West Virginia* by affirming its application to a claim for prejudgment interest on a strict liability, loss-spreading provision of the Food Stamp Program.

UNITED STATES *v.* GREEN

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91–1521. Argued November 30, 1992—Decided April 5, 1993

Order granting certiorari vacated, and certiorari dismissed. Reported below: 592 A. 2d 985.

Deputy Solicitor General Roberts argued the cause for the United States. On the briefs were *Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson, Robert A. Long, Jr.,* and *Nina Goodman.*

Joseph R. Conte argued the cause and filed a brief for respondent.*

PER CURIAM.

The Court is advised that the respondent died in Washington, D. C., on March 24, 1993. The Court's order granting the writ of certiorari, see 504 U. S. 908 (1992), therefore is vacated, and the petition for certiorari is dismissed. See *Mintzes* v. *Buchanon,* 471 U. S. 154 (1985).

It is so ordered.

**John Payton, Charles L. Reischel, Lutz Alexander Prager,* and *Edward E. Schwab* filed a brief for the District of Columbia as *amicus curiae* urging reversal.

David A. Reiser filed a brief for the Public Defender Service et al. as *amici curiae* urging affirmance.

Thomas J. Charron, Bernard J. Farber, Fred E. Inbau, Wayne W. Schmidt, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae.*

NEWARK MORNING LEDGER CO., AS SUCCESSOR TO THE HERALD CO. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91–1135. Argued November 10, 1992—Decided April 20, 1993

Petitioner newspaper publisher is the successor to The Herald Company. When, in 1976, Herald purchased substantially all the outstanding shares of Booth Newspapers, Inc., it allocated its adjusted income tax basis in the Booth shares among the assets it acquired in its merger with Booth. Among other things, it allocated \$67.8 million to an intangible asset denominated "paid subscribers," a figure that was petitioner's estimate of future profits to be derived from identified subscribers to Booth's eight newspapers on the date of merger. On its federal income tax returns for 1977–1980, Herald claimed depreciation deductions for the \$67.8 million, which were disallowed by the Internal Revenue Service (IRS) on the ground that the concept of "paid subscribers" was indistinguishable from goodwill and, therefore, was nondepreciable. Herald paid the taxes, and petitioner filed refund claims and ultimately brought suit in the District Court to recover taxes and interest paid. At trial, the Government did not contest petitioner's expert evidence on the methodology used to calculate its figure and stipulated to the useful life of "paid subscribers" for each newspaper. Instead, it estimated the asset's value at \$3 million, the cost of generating new subscriptions, and its principal argument remained that the asset was indistinguishable from goodwill. The court ruled in petitioner's favor, finding that the asset was not self-regenerating—*i. e.*, it had a limited useful life, the duration of which could be calculated with reasonable accuracy—that petitioner properly calculated its value, and that it was separate and distinct from goodwill. The Court of Appeals reversed, holding that even though the asset may have a limited useful life that can be ascertained with reasonable accuracy, its value is not separate and distinct from goodwill.

Held:

1. A taxpayer able to prove that a particular asset can be valued and that it has a limited useful life may depreciate its value over its useful life regardless of how much the asset appears to reflect the expectancy of continued patronage. Pp. 553–566.

(a) While the depreciation allowance of § 167(a) of the Internal Revenue Code applies to intangible assets, the IRS has consistently taken the position that goodwill is nondepreciable. Since the value of customer-based intangibles, such as customer and subscriber lists, obviously depends on continued and voluntary customer patronage, the question has been whether these intangibles can be depreciated notwithstanding their relationship to such patronage. The "mass asset" rule that courts often resort to in considering this question prohibits depreciation when the assets constitute self-regenerating assets that may change but never waste. Pp. 553–560.

(b) Whether or not taxpayers have been successful in separating depreciable intangible assets from goodwill in any particular case is a question of fact. The question is not whether an asset falls within the core of the concept of goodwill, but whether it is capable of being valued and whether that value diminishes over time. Pp. 560–566.

2. Petitioner has borne successfully its substantial burden of proving that "paid subscribers" constitutes an intangible asset with an ascertainable value and a limited useful life, the duration of which can be ascertained with reasonable accuracy. It has proved that the asset is not self-regenerating but rather wastes as a finite number of component subscriptions are canceled over a reasonably predictable period of time. The Government presented no evidence to refute the methodology petitioner used to estimate the asset's fair market value, and the uncontroverted evidence presented at trial revealed that "paid subscribers" had substantial value over and above that of a mere list of customers, as it was mistakenly characterized by the Government. Pp. 566–570.

945 F. 2d 555, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined, *post*, p. 571.

Robert H. Bork argued the cause for petitioner. With him on the briefs were *Bernard J. Long, Jr., Albert H. Turkus, Linda A. Fritts, Judith A. Mather, Corinne M. Antley, Peter C. Gould*, and *Steven Alan Reiss.*

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General Bruton,* *Kent L. Jones, Robert S. Pomerance, Francis M. Allegra,* and *Steven W. Parks.**

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether, under § 167 of the Internal Revenue Code, 26 U. S. C. § 167, the Internal Revenue Service (IRS) may treat as nondepreciable an intangible asset proved to have an ascertainable value and a limited useful life, the duration of which can be ascertained with reasonable accuracy, solely because the IRS considers the asset to be goodwill as a matter of law.[1]

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*Briefs of *amici curiae* urging reversal were filed for Black & Decker Corp. et al. by *Mark I. Levy, Arthur I. Gould, Roger J. Jones,* and *Andrew L. Frey;* for Charles Schwab Corp. by *Glenn A. Smith, Robert C. Alexander,* and *Teresa A. Maloney;* for Donrey, Inc., by *Lester G. Fant III, Daniel M. Davidson, Rex E. Lee,* and *Carter G. Phillips;* for the Independent Insurance Agents of America et al. by *Kenneth J. Kies;* for Magazine Publishers of America, Inc., by *James L. Malone III* and *George W. Benson;* for the New England Fuel Institute et al. by *Gary J. Klein, Bernhardt K. Wruble,* and *John S. Moot;* for the Tax Executives Institute, Inc., by *Timothy J. McCormally* and *Mary L. Fahey;* and for Worrell Enterprises, Inc., by *Malcolm L. Stein* and *Stanley E. Preiser.*

Briefs of *amici curiae* were filed for the American Bankers Association by *John J. Gill III, Michael F. Crotty, Joanne Ames, Philip C. Cook, Terence J. Greene,* and *Timothy J. Peaden;* for the American Business Press by *Robert A. Saltzstein, Stephen M. Feldman,* and *David R. Straus;* for Colorado National Bankshares, Inc., et al. by *James E. Bye* and *Richard G. Wilkins;* for Coopers & Lybrand by *David L. McLean;* for the Investment Counsel Association of America, Inc., by *Kenneth W. Gideon;* for the Newspaper Association of America by *George L. Middleton, Jr.,* and *Corrine M. Yu;* for Philip Morris Companies Inc. by *Jerome B. Libin* and *Padric K. J. O'Brien;* and for *Frederic W. Hickman et al., pro se.*

[1] Section 167 states:

"(a) General rule

"There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

"(1) of property used in the trade or business, or

I

Petitioner Newark Morning Ledger Co., a New Jersey corporation, is a newspaper publisher. It is the successor to The Herald Company with which it merged in 1987. Eleven years earlier, in 1976, Herald had purchased substantially all the outstanding shares of Booth Newspapers, Inc., the publisher of daily and Sunday newspapers in eight Michigan communities.[2] Herald and Booth merged on May 31, 1977, and Herald continued to publish the eight papers under their old names. Tax code provisions in effect in 1977 required that Herald allocate its adjusted income tax basis in the Booth shares among the assets acquired in proportion to their respective fair market values at the time of the merger. See 26 U. S. C. §§332 and 334(b)(2) (1976 ed.).[3]

Prior to the merger, Herald's adjusted basis in the Booth shares was approximately $328 million. Herald allocated $234 million of this to various financial assets (cash, securities, accounts and notes receivable, the shares of its wholly owned subsidiary that published Parade Magazine, etc.) and tangible assets (land, buildings, inventories, production

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"(2) of property held for the production of income."

Treasury Regulations § 1.167(a)–(3) interprets § 167(a) and states:

"If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill." 26 CFR § 1.167(a)–3 (1992).

[2] The eight Michigan papers were The Ann Arbor News, The Bay City Times, The Flint Journal, The Grand Rapids Press, The Jackson Citizen Patriot, Kalamazoo Gazette, The Muskegon Chronicle, and The Saginaw News.

[3] Section 334(b)(2) was repealed in 1982 and replaced by the somewhat different provisions of the present § 338 of the Code.

equipment, computer hardware, etc.). Herald also allocated $67.8 million to an intangible asset denominated "paid subscribers."[4] This consisted of 460,000 identified subscribers to the eight Booth newspapers as of May 31, 1977, the date of merger. These subscribers were customers each of whom had requested that the paper be delivered regularly to a specified address in return for payment of the subscription price. The $67.8 million figure was petitioner's estimate of future profits to be derived from these at-will subscribers, all or most of whom were expected to continue to subscribe after the Herald acquisition. The number of "paid subscribers" was apparently an important factor in Herald's decision to purchase Booth and in its determination of the appropriate purchase price for the Booth shares. See Brief for Petitioner 4–5. After these allocations, the approximately $26.2 million remaining was allocated to going-concern value and goodwill.

On its federal income tax returns for the calendar years 1977–1980, inclusive, Herald claimed depreciation deductions on a straight-line basis for the $67.8 million allocated to "paid subscribers." The IRS disallowed these deductions on the ground that the concept of "paid subscribers" was indistinguishable from goodwill and, therefore, was nondepreciable under the applicable regulations. Herald paid the resulting additional taxes. After the 1987 merger, petitioner filed timely claims for refund. The IRS took no action on the claims, and, upon the expiration of the prescribed 6-month period, see 26 U. S. C. § 6532(a)(1), petitioner brought suit in the District of New Jersey to recover taxes and interest that it claimed had been assessed and collected erroneously.

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[4] According to petitioner, the term " 'paid subscribers' is intended to reflect the fact that the customers in question paid for their newspapers, rather than receiving them for free, and that they subscribed to the newspaper, requesting regular delivery, rather than purchasing it on a single copy basis." Brief for Petitioner 4, n. 5. The term does not connote subscription payments in advance; indeed, the customer relationship was terminable at will.

The case was tried to the court. Petitioner presented financial and statistical experts who testified that, using generally accepted statistical techniques, they were able to estimate how long the average at-will subscriber of each Booth newspaper as of May 31, 1977, would continue to subscribe. The estimates ranged from 14.7 years for a daily subscriber to The Ann Arbor News to 23.4 years for a subscriber to the Sunday edition of The Bay City Times. This was so despite the fact that the total number of subscribers remained almost constant during the tax years in question. The experts based their estimates on actuarial factors such as death, relocation, changing tastes, and competition from other media. The experts also testified that the value of "paid subscribers" was appropriately calculated using the "income approach." Under this, petitioner's experts first calculated the present value of the gross-revenue stream that would be generated by these subscriptions over their estimated useful lives. From that amount they subtracted projected costs of collecting the subscription revenue. Petitioner contended that the resulting estimated net-revenue stream—calculated as $67,773,000 by one of its experts—was a reasonable estimate of the value of "paid subscribers."

The Government did not contest petitioner's expert evidence at all. In fact, it stipulated to the estimates of the useful life of "paid subscribers" for each newspaper. Also, on valuation, the Government presented little or no evidence challenging petitioner's calculations. Instead, it argued that the only value attributable to the asset in question was the cost of generating 460,000 new subscribers through a subscription drive. Under this "cost approach," the Government estimated the value of the asset to be approximately $3 million.

The Government's principal argument throughout the litigation has been that "paid subscribers" represents an asset indistinguishable from the goodwill of the Booth newspapers. According to the Government, the future stream of revenue expected to be generated by the 460,000 "paid subscribers" represented the very essence of the goodwill value of the newspapers. It argued that because goodwill is nondepreciable, the value of "paid subscribers" cannot be depreciated but must be added to basis so that, when the business is disposed of, the cost of the asset will be deducted from the proceeds in computing capital gain or loss.

The District Court (Judge H. Lee Sarokin) ruled in petitioner's favor. 734 F. Supp. 176 (NJ 1990). It found as a fact that the "paid subscribers" asset was not self-regenerating—it had a limited useful life the duration of which could be calculated with reasonable accuracy. *Id.*, at 180. The court further found that the value of "paid subscribers" was properly calculated using the "income approach" and that the asset itself was separate and distinct from goodwill. "[O]ne must distinguish between a galaxy of customers who may or may not return, whose frequency is unknown, and whose quantity and future purchases cannot be predicted, against subscribers who can be predicted to purchase the same item, for the same price on a daily basis." *Id.*, at 176–177.

The Court of Appeals for the Third Circuit reversed. 945 F. 2d 555 (1991). It concluded that the District Court had erred in defining goodwill as that which remains after all assets with determinable useful lives and ascertainable values have been accounted for. *Id.*, at 568. The court concluded that goodwill has a substantive meaning—the expectancy that "'old customers will resort to the old place' of business," *id.*, at 567—and that "paid subscribers" is the essence of goodwill. Even though the "paid subscribers" asset may have a limited useful life that can be ascertained with reasonable accuracy, the court held that its value is not separate and distinct from goodwill. *Id.*, at 568.

The Court of Appeals denied petitioner's suggestion for rehearing in banc, with two judges dissenting. See App. to

Pet. for Cert. 52a. In order to resolve an issue of substantial importance under the Internal Revenue Code and to settle a perceived conflict,[5] we granted certiorari, 503 U. S. 970 (1992).

II

Section 167(a) of the Code allows as a deduction for depreciation a reasonable allowance for the exhaustion and wear and tear, including obsolescence, of property used in a trade or business or of property held for the production of income. See n. 1, *supra*. This Court has held that "the primary purpose" of an annual depreciation deduction is "to further the integrity of periodic income statements by making a meaningful allocation of the cost entailed in the use (excluding maintenance expense) of the asset to the periods to which it contributes." *Massey Motors, Inc.* v. *United States*, 364 U. S. 92, 104 (1960). The depreciation deduction has been a part of the federal tax system at least since 1909, when Congress recognized that a corporation should calculate its annual net income by deducting from gross income "all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any." Tariff of 1909, § 38 Second, 36 Stat. 113. Nothing in the text of the 1909 statute or in the implementing Treasury Decision precluded a depreciation allowance for intangible property.[6] This changed in

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[5] Compare the Third Circuit's ruling in the present case with *Donrey, Inc.* v. *United States*, 809 F. 2d 534 (CA8 1987). See also *Citizens & Southern Corp.* v. *Commissioner*, 91 T. C. 463 (1988), aff'd, 919 F. 2d 1492 (CA11 1990).

[6] According to the Treasury Department, the depreciation deduction "should be the estimated amount of the loss, accrued during the year to which the return relates, in the value of the property in respect of which such deduction is claimed that arises from exhaustion, wear and tear, or obsolescence out of the uses to which the property is put . . . . This estimate should be formed upon the assumed life of the property, its cost value, and its use." Treas. Regs. 31, Art. 4, p. 11 (1909).

1914 with the promulgation of Treas. Regs. 33 (1914) issued under the 1913 Income Tax Law.[7]

The Revenue Act of 1918, § 234(a)(7), authorized a "reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." 40 Stat. 1078 (1919). Treasury Regs. 45 (1919), promulgated under the 1918 Act, explicitly recognized that intangible assets "may be the subject of a depreciation allowance." Art. 163. Thereafter, the regulations governing the depreciation of intangible assets have remained essentially unchanged. The current version is set forth in n. 1, *supra*.

Since 1927, the IRS consistently has taken the position that "goodwill" is nondepreciable.[8] One court has said specifically: "Indeed, this proposition is so well settled that the only question litigated in recent years regarding this area of the law is whether a particular asset is 'goodwill.'" *Hous-*

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[7] Treasury Regs. 33 provided explicitly that the depreciation deduction should be "estimated on the cost of the *physical property* with respect to which such deduction is claimed, which loss results from wear and tear due to the use to which the property is put" (emphasis added). Art. 159. Furthermore, "[a]ssets of any character whatever which are not affected by use, wear and tear (except patents, copyrights, etc.) are not subject to the depreciation allowance authorized by this act." Art. 162.

[8] Between 1919 and 1927, the IRS recognized that the goodwill of distillers and dealers might be depreciable as a result of the passage of the Eighteenth Amendment prohibiting the manufacture, sale, or transportation of intoxicating liquors. See T. B. R. 44, 1 Cum. Bull. 133 (1919). But in 1926, the Eighth Circuit, in *Red Wing Malting Co.* v. *Willcuts*, 15 F. 2d 626, cert. denied, 273 U. S. 763 (1927), ruled that, under the plain language of the Revenue Act of 1918, goodwill could not be depreciated, for the depreciation provision "limits the allowance for obsolescence to such property as is susceptible to exhaustion, wear, and tear by use in the business, and good will is not such property." 15 F. 2d, at 633. Following *Red Wing Malting*, the Treasury Department amended its regulations to provide: "No deduction for depreciation, including obsolescence, is allowable in respect of good will." T. D. 4055, VI–2 Cum. Bull. 63 (1927). That has been the position of the IRS ever since.

ton Chronicle Publishing Co. v. *United States,* 481 F. 2d 1240, 1247 (CA5 1973), cert. denied, 414 U. S. 1129 (1974).

III

A

"Goodwill" is not defined in the Code or in any Treasury Department Regulations. There have been attempts, however, to devise workable definitions of the term. In *Metropolitan Bank* v. *St. Louis Dispatch Co.,* 149 U. S. 436 (1893), for example, this Court considered whether a newspaper's goodwill survived after it was purchased and ceased publishing under its old name. It ruled that the goodwill did not survive, relying on Justice Story's notable description of "goodwill" as

> "'the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity, or even from ancient partialities or prejudices.'" *Id.,* at 446, quoting J. Story, Partnerships § 99 (1841).

In *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153 (1915), the Court described goodwill as "that element of value which inheres in the fixed and favorable consideration of customers, arising from an established and well-known and well-conducted business." *Id.,* at 165. See also *Los Angeles Gas & Electric Corp.* v. *Railroad Comm'n of California,* 289 U. S. 287, 313 (1933) (distinguishing "going concern" from "good will" when fixing rates for public utilities).

Although the definition of goodwill has taken different forms over the years, the shorthand description of goodwill as "the expectancy of continued patronage," *Boe* v. *Commis-*

sioner, 307 F. 2d 339, 343 (CA9 1962), provides a useful label with which to identify the total of all the imponderable qualities that attract customers to the business. See *Houston Chronicle Publishing Co.* v. *United States,* 481 F. 2d, at 1248, n. 5. This definition, however, is of little assistance to a taxpayer trying to evaluate which of its intangible assets is subject to a depreciation allowance. The value of every intangible asset is related, to a greater or lesser degree, to the expectation that customers will continue their patronage.[9] But since 1918, at least some intangible assets have been depreciable. Because intangible assets do not exhaust or waste away in the same manner as tangible assets, taxpayers must establish that public taste or other socioeconomic forces will cause the intangible asset to be retired from service, and they must estimate a reasonable date by which this event will occur. See B. Bittker & M. McMahon, Federal Income Taxation of Individuals ¶12.4, p. 12–10 (1988). Intangibles such as patents and copyrights are depreciable over their "legal lives," which are specified by statute. Covenants not to compete, leaseholds, and life estates, for example, are depreciable over their useful lives that are expressly limited by contract.

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[9] We emphasize that while the "expectancy of continued patronage" is a serviceable description of what we generally mean when we describe an intangible asset that has no useful life and no ascertainable value, this shibboleth tells us nothing about whether the asset in question is depreciable. The dissent concedes that "the law concerning the depreciation of intangible assets related to goodwill has developed on a case-by-case basis," *post,* at 576, n. 4, yet, inexplicably, it suggests that "[s]uch matters are not at issue in this case, however, because the asset that Ledger seeks to depreciate is indistinguishable from goodwill," *ibid.* As we demonstrate below, an intangible asset with an ascertainable value and a limited useful life, the duration of which can be ascertained with reasonable accuracy, is depreciable under § 167 of the Code. The fact that it may also be described as the "expectancy of continued patronage" is entirely beside the point.

The category of intangibles that has given the IRS and the courts difficulty is that group of assets sometimes denominated "customer-based intangibles." This group includes customer lists, insurance expirations, subscriber lists, bank deposits, cleaning-service accounts, drugstore-prescription files, and any other identifiable asset the value of which obviously depends on the continued and voluntary patronage of customers. The question has been whether these intangibles can be depreciated notwithstanding their relationship to "the expectancy of continued patronage."

B

When considering whether a particular customer-based intangible asset may be depreciated, courts often have turned to a "mass asset" or "indivisible asset" rule. The rule provides that certain kinds of intangible assets are properly grouped and considered as a single entity; even though the individual components of the asset may expire or terminate over time, they are replaced by new components, thereby causing only minimal fluctuations and no measurable loss in the value of the whole. The following is the usually accepted description of a mass asset:

> "[A] purchased terminable-at-will type of customer list is an indivisible business property with an indefinite, nondepreciable life, indistinguishable from—and the principal element of—goodwill, whose ultimate value lies in the expectancy of continued patronage through public acceptance. It is subject to temporary attrition as well as expansion through departure of some customers, acquisition of others, and increase or decrease in the requirements of individual customers. A normal turnover of customers represents merely the ebb and flow of a continuing property status in this species, and does not within ordinary limits give rise to the right to deduct for tax purposes the loss of individual customers. The whole is equal to the sum of its fluctuating parts at any

> given time, but each individual part enjoys no separate capital standing independent of the whole, for its disappearance affects but does not interrupt or destroy the continued existence of the whole." *Golden State Towel & Linen Service, Ltd.* v. *United States,* 179 Ct. Cl. 300, 310, 373 F. 2d 938, 944 (1967).

The mass-asset rule prohibits the depreciation of certain customer-based intangibles because they constitute self-regenerating assets that may change but never waste. Although there may have been some doubt prior to 1973 as to whether the mass-asset rule required that any asset related to the expectancy of continued patronage always be treated as nondepreciable goodwill as a matter of law, that doubt was put to rest by the Fifth Circuit in the *Houston Chronicle* case. The court there considered whether subscription lists, acquired as part of the taxpayer's purchase of The Houston Press, were depreciable. The taxpayer had no intention of continuing publication of the purchased paper, so there was no question of the lists' being self-regenerating; they had value only to the extent that they furnished names and addresses of prospective subscribers to the taxpayer's newspaper. After reviewing the history of the mass-asset rule, the court concluded that there was no *per se* rule that an intangible asset is nondepreciable whenever it is related to goodwill. On the contrary, the rule does not prevent taking a depreciation allowance "if the taxpayer properly carries his dual burden of proving that the intangible asset involved (1) has an ascertainable value separate and distinct from goodwill, and (2) has a limited useful life, the duration of which can be ascertained with reasonable accuracy." *Houston Chronicle,* 481 F. 2d, at 1250.

Following the decision in *Houston Chronicle,* the IRS issued a new ruling, modifying prior rulings "to remove any implication that customer and subscription lists, location contracts, insurance expirations, etc., are, as a matter of law, indistinguishable from goodwill possessing no determinable useful life." Rev. Rul. 74–456, 1974–2 Cum. Bull. 65, 66. The IRS continued to claim that customer-based intangibles generally are in the nature of goodwill, representing "the customer structure of a business, their value lasting until an indeterminate time in the future." Nonetheless, it acknowledged that, "in an unusual case," the taxpayer may prove that the "asset or a portion thereof does not possess the characteristics of goodwill, is susceptible of valuation, and is of use to the taxpayer in its trade or business for only a limited period of time." *Ibid.* Under these circumstances, the IRS recognized the possibility that the customer-based intangible asset could be depreciated over its useful life.

Despite the suggestion by the Court of Appeals in this case that the mass-asset rule is "now outdated," 945 F. 2d, at 561, it continues to guide the decisions of the Tax Court with respect to certain intangible assets. In *Ithaca Industries, Inc.* v. *Commissioner*, 97 T. C. 253 (1991), for example, the Tax Court recently considered whether a taxpayer could depreciate the value allocated to the trained work force of a purchased going concern over the length of time each employee remained with the purchasing company. The court acknowledged that "whether the assembled work force is an intangible asset with an ascertainable value and a limited useful life separate from goodwill or going-concern value is a question of fact." *Id.*, at 263–264. After reviewing the record, it concluded that the mass-asset rule applied to prohibit the depreciation of the cost of acquiring the assembled work force:

> "Although the assembled work force is used to produce income, this record fails to show that its value diminishes as a result of the passing of time or through use. As an employee terminated his or her employment, another would be hired and trained to take his or her place. While the assembled work force might be subject to temporary attrition as well as expansion through departure of some employees and the hiring of others, it

> would not be depleted due to the passage of time or as a result of use. The turnover rate of employees represents merely the ebb and flow of a continuing work force. An employee's leaving does not interrupt or destroy the continued existence of the whole." *Id.*, at 267.

As a factual matter, the Tax Court found that the taxpayer hired a new worker only so it could replace a worker "who resigned, retired, or was fired." *Id.*, at 268. The court found that the "assembled work force" was a nondiminishing asset; new employees were trained in order to keep the "assembled work force" unchanged, and the cost of the training was a deductible expense. *Id.*, at 271.

IV

Since 1973, when *Houston Chronicle* clarified that the availability of the depreciation allowance was primarily a question of fact, taxpayers have sought to depreciate a wide variety of customer-based intangibles. The courts that have found these assets depreciable have based their conclusions on carefully developed factual records. In *Richard S. Miller & Sons, Inc.* v. *United States*, 210 Ct. Cl. 431, 537 F. 2d 446 (1976), for example, the court considered whether a taxpayer was entitled to a depreciation deduction for 1,383 insurance expirations that it had purchased from another insurer.[10] The court concluded that the taxpayer had carried its heavy burden of proving that the expirations had an ascertainable value separate and distinct from goodwill and had a limited useful life, the duration of which could be ascertained with reasonable accuracy. The court acknowledged that the insurance expirations constituted a "mass asset" the useful life of which had to be "determined from facts relative to the whole, and not from experience with any particular policy or account involved." *Id.*, at 443, 537 F. 2d, at 454. The court also noted, however, that the mass-asset rule does not prevent a depreciation deduction "where the expirations as a single asset can be valued separately and the requisite showing made that the useful life of the information contained in the intangible asset as a whole is of limited duration." *Id.*, at 439, 537 F. 2d, at 452. All the policies were scheduled to expire within three years, but their continuing value lay in their being renewable. Based on statistics gathered over a 5-year period, the taxpayer was able to estimate that the mass asset had a useful life of not more than 10 years from the date of purchase. Any renewals after that time would be attributable to the skill, integrity, and reputation of the taxpayer rather than to the value of the original expirations. "The package of expirations demonstrably was a wasting asset." *Id.*, at 444, 537 F. 2d, at 455. The court ruled that the taxpayer could depreciate the cost of the collection of insurance expirations over the useful life of the mass asset.

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[10] An "expiration" is a copy of the face of an insurance policy made when the policy is issued. It shows the name of the insured, the type of insurance, the premium, the covered property, and the expiration date. "Its principal value in the insurance business is its indication of the most advantageous time to solicit a renewal." *Richard S. Miller & Sons, Inc.* v. *United States*, 210 Ct. Cl., at 436, 537 F. 2d, at 450.

In *Citizens & Southern Corp.* v. *Commissioner*, 91 T. C. 463 (1988), aff'd, 919 F. 2d 1492 (CA11 1990), the taxpayer argued that it was entitled to depreciate the bank-deposit base acquired in the purchase of nine separate banks.[11] The taxpayer sought to depreciate the present value of the income it expected to derive from the use of the balances of deposit accounts existing at the time of the bank purchases.

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[11] The term "deposit base" describes "the intangible asset that arises in a purchase transaction representing the present value of the future stream of income to be derived from employing the purchased core deposits of a bank." *Citizens & Southern Corp.* v. *Commissioner*, 91 T. C., at 465. The value of the deposit base rests upon the "ascertainable probability that inertia will cause depositors to leave their funds on deposit for predictable periods of time." *Id.*, at 500.

The Commissioner argued that the value of the core deposits was inextricably related to the value of the overall customer relationship, that is, to goodwill. The Commissioner also argued that the deposit base consisted of purchased, terminable-at-will customer relationships that are equivalent to goodwill as a matter of law. The Tax Court rejected the Commissioner's position, concluding that the taxpayer had demonstrated with sufficient evidence that the economic value attributable to the opportunity to invest the core deposits could be (and, indeed, was) valued and that the fact that new accounts were opened as old accounts closed did not make the original purchased deposit base self-regenerating. 91 T. C., at 499.

The court also concluded that, based on "lifing studies" estimating the percentage of accounts that would close over a given period of time, the taxpayer established that the deposit base had a limited useful life, the duration of which could be ascertained with reasonable accuracy. The taxpayer had established the value of the intangible asset using the cost-savings method, entitling it to depreciate that portion of the purchase price attributable to the present value of the difference between the ongoing costs associated with maintaining the core deposits and the cost of the market alternative for funding its loans and other investments. *Id.*, at 510.

The Tax Court reached the same result in *Colorado National Bankshares, Inc.* v. *Commissioner,* 60 TCM 771 (1990), ¶ 90,495 P–H Memo TC, aff'd, 984 F. 2d 383 (CA10 1993). The Tax Court concluded that

> "the value of the deposit base does not depend upon a vague hope that customers will patronize the bank for some unspecified length of time in the future. The value of the deposit base rests upon the ascertainable probability that inertia will cause depositors to leave their funds on deposit for predictable periods of time."

> *Colorado National Bankshares,* 60 TCM, at 789, ¶ 90,495 P–H Memo TC, at 2,396.

The court specifically found that the deposit accounts could be identified; that they had limited lives that could be estimated with reasonable accuracy; and that they could be valued with a fair degree of accuracy. They were also not self-regenerating. "It is these characteristics which separate them from general goodwill and permits separate valuation." *Ibid.* See also *IT&S of Iowa, Inc.* v. *Commissioner,* 97 T. C. 496, 509 (1991); *Northern Natural Gas Co.* v. *O'Malley,* 277 F. 2d 128, 139 (CA8 1960) (concurring opinion).

The Eighth Circuit has considered a factual situation nearly identical to the case now before us. In *Donrey, Inc.* v. *United States,* 809 F. 2d 534 (1987), the taxpayer sought to depreciate the subscription list of a newspaper it had purchased as a going concern. The taxpayer asserted that the subscription list was not simply a list of customers but "a machine to generate advertising revenue." *Id.,* at 536. There was expert testimony that the value of the subscription list was "the present value of the difference in advertising revenues generated by the subscription list as compared to the revenues of an equivalent paper without a subscription list." *Ibid.* A jury found that the list had a limited useful life, the duration of which could be ascertained with reasonable accuracy; that the useful life was 23 years; and that it had an ascertainable value of $559,406 separate and distinct from goodwill. The District Court denied a motion for judgment notwithstanding the verdict after concluding that, although reasonable minds could have differed as to the correct result, there was evidence from which the jury could properly find for the taxpayer. The Court of Appeals implicitly rejected the Government's argument that the subscription list was necessarily inseparable from the value of goodwill when it deferred to the jury's finding that the subscription list was depreciable because it had a determinable useful life and an ascertainable value.

V

A

Although acknowledging the "analytic force" of cases such as those discussed above, the Court of Appeals in the present case characterized them as "no more than a minority strand amid the phalanx of cases" that have adopted the Government's position on the meaning of goodwill. 945 F. 2d, at 565.[12] "In any case, consistent with the prevailing case law, we believe that the [IRS] is correct in asserting that, for tax purposes, there are some intangible assets which, notwithstanding that they have wasting lives that can be estimated with reasonable accuracy and ascertainable values, are nonetheless goodwill and nondepreciable." *Id.*, at 568. The Court of Appeals concluded further that in "the context of the sale of a going concern, it is simply often too difficult for the taxpayer and the court to separate the value of the list *qua* list from the goodwill value of the customer relationships/structure." *Ibid.* We agree with that general observation. It is often too difficult for taxpayers to separate depreciable intangible assets from goodwill. But sometimes they manage to do it. And whether or not they have been successful in any particular case is a question of fact.

The Government concedes: "The premise of the regulatory prohibition against the depreciation of goodwill is that, like stock in a corporation, a work of art, or raw land, goodwill has no determinate useful life of specific duration." Brief for United States 13. See also *Richard S. Miller & Sons, Inc.* v. *United States*, 210 Ct. Cl., at 437, 537 F. 2d, at 450 ("Goodwill is a concept that embraces many intangible elements and is presumed to have a useful life of indefinite duration"). The entire justification for refusing to permit the depreciation of goodwill evaporates, however, when the taxpayer demonstrates that the asset in question wastes over an ascertainable period of time. It is more faithful to the purposes of the Code to allow the depreciation deduction under these circumstances, for "the Code endeavors to match expenses with the revenues of the taxable period to which they are properly attributable, thereby resulting in a more accurate calculation of net income for tax purposes," *INDOPCO, Inc.* v. *Commissioner*, 503 U. S. 79, 84 (1992).[13]

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[12] At least one commentator has taken issue with the Court of Appeals' characterization of the recent cases as nothing but a "minority strand." See Avi-Yonah, Newark Morning Ledger: A Threat to the Amortizability of Acquired Intangibles, 55 Tax Notes 981, 984 (1992) (of the 14 cases cited by the Third Circuit that were decided after *Houston Chronicle* in 1973, the IRS has prevailed in only 6 of them; "hardly an 'overwhelming weight of authority' in the IRS' favor, especially given that two of the IRS victories, but none of the taxpayers,' were only at the district court level"). Regardless of whether the cases discussed in Part IV, *supra*, are characterized as a "minority strand" or as a "modern trend," we find their reasoning and approach persuasive.

In the case that first established the principle that goodwill was not depreciable, the Eighth Circuit recognized that the reason for treating goodwill differently was simple and direct: "'As good will does not suffer wear and tear, does not become obsolescent, is not used up in the operation of the business, depreciation, as such, cannot be charged against it.'" *Red Wing Malting Co.* v. *Willcuts*, 15 F. 2d 626, 633 (1926), cert. denied, 273 U. S. 763 (1927). See also 5 J. Mertens, Law of Federal Income Taxation § 23A.01, p. 7 (1990) ("Goodwill is not amortizable intangible property *because* its useful life cannot be ascertained with reasonable accuracy" (emphasis added)). It must follow that if a taxpayer can prove with reasonable accuracy that an asset used in the trade or business or held for the production of income has a value that wastes over an ascertainable period of time, that asset is depreciable under § 167, regardless of the fact that its value is related to the expectancy of continued patronage. The significant question for purposes of depreciation is not whether the asset falls "within the core of the concept of goodwill," Brief for United States 19, but whether the asset is capable of being valued and whether that value diminishes over time. In a different context, the IRS itself succinctly articulated the relevant principle: "Whether or not an intangible asset, or a tangible asset, is depreciable for Federal income tax purposes depends upon the determination that the asset is actually exhausting, and that such exhaustion is susceptible of measurement." Rev. Rul. 68–483, 1968–2 Cum. Bull. 91–92.

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[13] The dissent suggests that we are usurping the proper role of Congress by seeking to "modify the *per se* ban on depreciating goodwill," *post*, at 582, n. 10. But we are doing nothing of the kind. We simply have determined that, in light of the factual record in this case, the "paid subscribers" asset is depreciable. The dissent's mistake is to assume that because the "paid subscribers" asset looks and smells like the "expectancy of continued patronage," it is, *ipso facto*, nondepreciable. In our view, however, whether or not an asset is depreciable is not a question to be settled by definition. "Goodwill" remains nondepreciable under applicable regulations, and we do not purport to change that fact. In interpreting those regulations, however, we have concluded that because the "paid subscribers" is an asset found to have a limited useful life and an ascertainable value which may be determined with reasonable accuracy, it is depreciable. By definition, therefore, it is not "goodwill."

B

Although we now hold that a taxpayer able to prove that a particular asset can be valued and that it has a limited useful life may depreciate its value over its useful life regardless of how much the asset appears to reflect the expectancy of continued patronage, we do not mean to imply that the taxpayer's burden of proof is insignificant. On the contrary, that burden often will prove too great to bear. See, *e. g.*, Brief for Coopers & Lybrand as *Amicus Curiae* 11 ("For example, customer relationships arising from newsstand sales *cannot* be specifically identified. In [our] experience, customers were identified but their purchases were too sporadic and unpredictable to reasonably ascertain either the duration of the relationships or the value of the relationships (based on their net income stream)" (emphasis in original)).

Petitioner's burden in this case was made significantly lighter by virtue of the Government's litigation strategy:

> "[B]ecause of the stipulation reached by the parties, Morning Ledger need not prove either the specific useful lives of the paid subscribers of the Booth newspapers as of May 31, 1977, or that Dr. Glasser [its statistical expert] has correctly estimated those lives. In light of the stipulation, [the Government's] argument with regard to Dr. Glasser's estimation of the specific useful lives of the Booth subscribers is wholly irrelevant. Instead, Dr. Glasser's testimony establishes that qualified experts could estimate with reasonable accuracy the remaining useful lives of the paid subscribers of the Booth newspapers as of May 31, 1977." 734 F. Supp., at 181.

Petitioner also proved to the satisfaction of the District Court that the "paid subscribers" asset was not self-regenerating, thereby distinguishing it for purposes of applying the mass-asset rule:

> "[T]here is no automatic replacement for a subscriber who terminates his or her subscription. Although the total number of subscribers may have or has remained relatively constant, the individual subscribers will not and have not remained the same, and those that may or have discontinued their subscriptions can be or have been replaced only through the substantial efforts of the Booth newspapers." *Id.*, at 180.

The 460,000 "paid subscribers" constituted a finite set of subscriptions, existing on a particular date—May 31, 1977. The asset was not composed of constantly fluctuating components; rather, it consisted of identifiable subscriptions each of which had a limited useful life that could be estimated with reasonable accuracy according to generally accepted statistical principles. Petitioner proved as a matter of fact that the value of the "paid subscribers" diminished over an ascertainable period of time.[14]

C

Petitioner estimated the fair market value of the "paid subscribers" at approximately $67.8 million. This figure was found by computing the present value of the after-tax subscription revenues to be derived from the "paid subscribers," less the cost of collecting those revenues, and adding the present value of the tax savings resulting from the depreciation of the "paid subscribers." As the District Court explained, the taxpayer's experts "utilized this method because they each independently concluded that this method best determined the additional value of the Booth newspapers attributable to the existence of the paid subscribers as of May 31, 1977, and, thus, the fair market value of those subscribers." *Id.*, at 183. The Government presented no evidence challenging the accuracy of this methodology. It took the view that the only value attributable to the "paid subscribers" was equivalent to the cost of generating a similar list of new subscribers, and it estimated that cost to be approximately $3 million. The Court of Appeals agreed with the Government that this "cost approach" was the only appropriate method for valuing the list of subscribers. "The fact is that, when employed in the context of the sale of an ongoing concern, the income approach to valuing a list of customers inherently includes much or all of the value of the expectancy that those customers will continue their patronage—i. e., the goodwill of the acquired concern." 945 F. 2d, at 568.

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[14] The dissent spends a substantial amount of time worrying about the sufficiency of petitioner's evidence. See *post,* at 576–582. The problem with petitioner's expert, according to the dissent, is that he predicted only how long a subscriber is likely to subscribe, and this "tells us nothing about how long date-of-sale subscriber habit or inertia will remain a cause of predicted subscriber faithfulness." *Post,* at 581. The dissent concludes that "Ledger's expert on his own terms has not even claimed to make the showing of definite duration necessary to depreciate an asset under § 167(a)." *Post,* at 582. We have little doubt that had the Government presented credible evidence challenging the relevance of this testimony, the District Court would have had a more difficult time deciding this case. As it happened, however, petitioner's evidence of the useful life of the "paid subscribers" was the only evidence the District Court had before it. The dissent skillfully demonstrates certain vulnerabilities in petitioner's proof, but the Government chose, rather, to rest its entire case on a legal argument that we now reject. This case was lost at trial.

Both the Government and the Court of Appeals mischaracterized the asset at issue as a mere list of names and addresses. The uncontroverted evidence presented at trial revealed that the "paid subscribers" had substantial value over and above that of a mere list of customers. App. 67 (Price Waterhouse's Fair Market Value Study of Paid Newspaper Subscribers to Booth Newspapers as of May 31, 1977); *id.*, at 108–111 (testimony of Roger J. Grabowski, Principal and National Director, Price Waterhouse Valuation Services). These subscribers were "seasoned"; they had subscribed to the paper for lengthy periods of time and represented a reliable and measurable source of revenue. In contrast to new subscribers, who have no subscription history and who might not last beyond the expiration of some promotional incentive, the "paid subscribers" at issue here provided a regular and predictable source of income over an estimable period of time. The cost of generating a list of *new* subscribers is irrelevant, for it represents the value of an entirely different asset. We agree with the District Court when it concluded:

> "Although it was possible to estimate the direct cost of soliciting additional subscribers to the Booth newspapers, those subscribers if obtained were not and would not have been comparable, in terms of life characteris-

> tics or value, to the paid subscribers of the Booth newspapers as of May 31, 1977. . . . The cost of generating such marginal subscribers would not reflect the fair market value of the existing subscribers of the Booth newspapers as of May 31, 1977." 734 F. Supp., at 181.

Because it continued to insist that petitioner had used the wrong valuation methodology, the Government failed to offer any evidence to challenge the accuracy of petitioner's application of the "income approach." The District Court found that the aggregate fair market value of the "paid subscribers" of the Booth newspapers as of May 31, 1977—*i. e.*, "the price at which the asset would change hands between a hypothetical willing buyer and willing seller, neither being under any compulsion to buy or sell, both parties having reasonable knowledge of relevant facts," *id.*, at 185—was $67,773,000, with a corresponding adjusted income tax basis of $71,201,395. Petitioner was entitled to depreciate this adjusted basis using a straight-line method over the stipulated useful lives.

VI

Petitioner has borne successfully its substantial burden of proving that "paid subscribers" constitutes an intangible asset with an ascertainable value and a limited useful life, the duration of which can be ascertained with reasonable accuracy. It has proved that the asset is not self-regenerating but rather wastes as the finite number of component subscriptions are canceled over a reasonably predictable period of time. The relationship this asset may have to the expectancy of continued patronage is irrelevant, for it satisfies all the necessary conditions to qualify for the depreciation allowance under § 167 of the Code.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOUTER, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join, dissenting.

Newark Morning Ledger seeks a depreciation[1] deduction under 26 U. S. C. § 167(a) for an intangible asset it variously refers to as "paid subscribers," see Brief for Petitioner 4–5, or "subscriber relationships," see Tr. of Oral Arg. 3. The Court of Appeals rejected Ledger's claim on the authority of a Treasury regulation providing (a) that an intangible asset may be depreciated only if it has a limited useful life "the length of which can be estimated with reasonable accuracy," and (b) that "[n]o deduction for depreciation is allowable with respect to goodwill." 26 CFR § 1.167(a)–3 (1992); see 945 F. 2d 555, 558, 567–569 (CA3 1991). Ledger claims the regulation raises no bar to a deduction, arguing that (1) the asset is not goodwill, because (2) it has a limited useful life actually estimated with reasonable accuracy. Ledger is wrong on both counts. Ledger's asset is unmistakably a direct measurement of goodwill, and Ledger's expert testimony failed to show any particular lifespan for the goodwill Ledger acquired.

I

When The Herald Company (now merged with Newark Morning Ledger) bought and liquidated the stock of Booth Newspapers, Inc., it allocated $67.8 million of the stock's adjusted basis to an asset called "paid subscribers." Although, as will appear, this label is misdescriptive, it need not confuse anyone about the true nature of the asset, since Ledger has explained clearly how it determined the asset's value. Ledger got to the $67.8 million figure by predicting the future net revenues to be generated by the 460,000 people who subscribed to the eight Booth newspapers as of the date of sale, May 31, 1977. Because these customers had neither paid in advance nor agreed to subscribe for any set term, see Brief for Petitioner 4, n. 5; *ante,* at 550, n. 4, they were merely at-will subscribers; the value of their expected future custom was capitalized as the asset Ledger seeks to depreciate.

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[1] Black's Law Dictionary tells us that intangible assets are amortized, while tangible assets are depreciated. Black's Law Dictionary 83, 441 (6th ed. 1990); see also Gregorcich, Amortization of Intangibles: A Reassessment of the Tax Treatment of Purchased Goodwill, 28 Tax Law. 251, 253 (1975) ("Amortization is the commonly accepted way of referring to depreciation of intangible property"). The statute and the regulations, however, use only the term depreciation.

However much Ledger claims this asset to be something different from "goodwill," the settled meaning of the term is flatly at odds with Ledger's contention. Since the days of Justice Story, we have understood the concept of "goodwill" to be anchored in the patronage a business receives from "constant or habitual" customers. See, *e. g., Metropolitan Bank* v. *St. Louis Dispatch Co.,* 149 U. S. 436, 446 (1893); *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153 (1915); see also *Cruttwell* v. *Lye,* 17 Ves. Jr. 335, 346, 34 Eng. Rep. 129, 134 (Ch. 1810) (opinion of Lord Eldon) (goodwill is "nothing more than the probability, that the old customers will resort to the old place"). Although this Court has not had occasion to provide a precise definition of the term as it appears in the depreciation regulation, the Courts of Appeals have consistently held that "goodwill," in this context, refers to "the expectancy of continued patronage" from existing customers or, alternatively, to the prospect that "the old customers will resort to the old place." See, *e. g., Winn-Dixie Montgomery, Inc.* v. *United States,* 444 F. 2d 677, 681 (CA5 1971); *Commissioner* v. *Seaboard Finance Co.,* 367 F. 2d 646, 649 (CA9 1966); *Boe* v. *Commissioner,* 307 F. 2d 339, 343 (CA9 1962); *Dodge Brothers, Inc.* v. *United States,* 118 F. 2d 95, 101 (CA4 1941); see also *Golden State Towel & Linen Service, Ltd.* v. *United States,* 179 Ct. Cl. 300, 305–309, 373 F. 2d 938, 941–943 (1967); *Karan* v. *Commissioner,* 319 F. 2d 303, 306 (CA7 1963) (goodwill denotes an expectancy that a customer relationship will continue "without contractual compulsion"). Thus, the Government justifiably concludes that "goodwill," as used in its own regulation, refers to the expectation of continued patronage by existing customers. See Brief for United States 16–19.

Under this accepted definition of "goodwill," there can be no doubt that the asset Ledger calls "paid subscribers" or "subscriber relationships" is simply the goodwill associated with those subscribers. Once this is clear, it becomes equally clear that Ledger should lose, since the intangible asset regulation expressly and categorically bars depreciation of goodwill, and courts have uniformly relied on that regulation's plain language to conclude that goodwill is nondepreciable as a matter of law. See *Houston Chronicle Publishing Co.* v. *United States*, 481 F. 2d 1240, 1247 (CA5 1973) (the proposition that goodwill is nondepreciable as a matter of law "is so well settled that the only question litigated in recent years regarding this area of the law is whether a particular asset is 'goodwill'"), cert. denied, 414 U. S. 1129 (1974); see also *Donrey, Inc.* v. *United States*, 809 F. 2d 534, 536 (CA8 1987) (goodwill "is ineligible per se for the depreciation deduction"); *Richard S. Miller & Sons, Inc.* v. *United States*, 210 Ct. Cl. 431, 437, 537 F. 2d 446, 450 (1976) ("the presumption that [goodwill] is a nondepreciable capital asset is conclusive"); *Boe* v. *Commissioner, supra*, at 343 ("good will is not a depreciable asset").

II

Ledger tries to slip out of this predicament by two separate steps. It argues first that the Court ought to adopt a new definition of "goodwill" that would not cover any expectation of future custom with a lifespan subject to definite advance estimate; then it claims that the asset here falls outside the new definition because Ledger's expert has predicted the length of the asset's wasting life with reasonable accuracy. See Brief for Petitioner 12–13. The Court makes a serious mistake in taking the first step; Ledger should lose in any event, however, since its expert has failed to furnish the basis for taking the second.

A

Ledger would have us scrap the accepted and substantive definition of "goodwill" as an expectation of continued patronage, in favor of a concept of goodwill as a residual asset of ineffable quality, whose existence and value would be represented by any portion of a business's purchase price not attributable to identifiable assets with determinate lives. Goodwill would shrink to an accounting leftover. See *id.*, at 19, 29–30 (relying on accounting standards).

In accommodating Ledger on this point, see *ante*, at 565, n. 13, the Court abandons the settled construction of a regulation more than 65 years old,[2] see T. D. 4055, VI–2 Cum.

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[2] The current intangible asset regulation can be traced back to Treasury Regulation 45, issued in 1919, which provided that there could be no deduction "in respect of good will" under the general depreciation provision of the Revenue Act of 1918 because goodwill was an example of an asset that did not have a useful life "definitely limited in duration." T. D. 2831, 21 Treas. Dec. 214, Art. 163. The Commissioner dropped the reference to goodwill for a few years, in response to attempts by distillers and brewers to depreciate goodwill made obsolete by the adoption of the Eighteenth Amendment. See T. D. 2929, 1 Cum. Bull. 133 (1919); see also T. D. 3146, 23 Treas. Dec. 402, Art. 163 (1920) (reflecting this change). The first Court of Appeals to address the subject, however, held that goodwill could not be depreciated under the Revenue Act of 1918 because it was not susceptible to exhaustion or wear and tear, as required by the statute. *Red Wing Malting Co.* v. *Willcuts*, 15 F. 2d 626 (CA8 1926), cert. denied, 273 U. S. 763 (1927). Shortly after that decision, the Commissioner amended the intangible asset regulation by adding the following prohibition: "No deduction for depreciation, including obsolescence, is allowable in respect of good will." T. D. 4055, VI–2 Cum. Bull. 63 (1927). It has remained there ever since. See, *e. g.*, Treas. Regs. 77, Art. 203 (Revenue Act of 1932); Treas. Regs. 86, Art. 23(*l*)–3 (Revenue Act of 1934); Treas. Regs. 94, Art. 23(*l*)–3 (Revenue Act of 1936); Treas. Regs. 103, § 19.23(*l*)–3 (Internal Revenue Code of 1939); 26 CFR § 1.167(a)–3 (1961) (Internal Revenue Code of 1954).

Although *Red Wing Malting* provoked a Circuit split, this Court resolved the conflict a few years later by deciding, in line with the Commis-

Bull. 63 (1927), and repudiates the equally settled interpretation of the corresponding section of the tax code itself. We are, after all, dealing with a statute reenacted without substantial change not less than six times since 1919, see Revenue Act of 1918, § 234(a)(7), 40 Stat. 1078 (1919); Revenue Act of 1932, § 23(k), 47 Stat. 181; Revenue Act of 1934, § 23(*l*), 48 Stat. 689; Revenue Act of 1936, § 23(*l*), 49 Stat. 1660; Revenue Act of 1938, § 23(*l*), 52 Stat. 462; Internal Revenue Code of 1939, § 23(*l*), 53 Stat. 14; Internal Revenue Code of 1954, § 167(a), 68A Stat. 51, and we may presume that Congress has accepted the understanding set out in the cognate intangible asset regulation and in the judicial decisions that have clarified that regulation's terms.[3] *Lorillard* v. *Pons,* 434 U. S. 575, 580 (1978); *United States* v. *Correll,* 389 U. S. 299, 305–306 (1967); *Helvering* v. *Winmill,* 305 U. S. 79, 83 (1938). The consequences, therefore, of acceding to Ledger's argument are at once a rejection of statutory interpretation settled by Congress itself through reenactment of the tax code and a further invasion of the political domain to rewrite a Treasury regulation.[4] See *Correll, supra,* at 307 (this Court

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sioner's amended regulation, that a brewery could not deduct for the "exhaustion" or "obsolescence" of goodwill as a result of Prohibition. See *Clarke* v. *Haberle Crystal Springs Brewing Co.,* 280 U. S. 384 (1930); *Renziehausen* v. *Lucas,* 280 U. S. 387 (1930); see also *V. Loewers Gambrinus Brewery Co.* v. *Anderson,* 282 U. S. 638 (1931) (distinguishing *Haberle Springs* and allowing a brewery to claim a depreciation deduction for buildings made obsolete by Prohibition).

[3] Legislative materials indicate that Congress is, in fact, aware of the accepted definition of "goodwill." See, *e. g.,* H. R. Conf. Rep. No. 100–495, p. 937 (1987) ("Goodwill has been defined as the expectancy of continued patronage, for whatever reason, or as the probability that old customers will resort to the old place").

[4] The majority discounts these consequences by claiming that the utility of the accepted definition of "goodwill" is limited because "[t]he value of every intangible asset is related, to a greater or lesser degree, to the expectation that customers will continue their patronage." *Ante,* at 556. But the regulation does not provide that every intangible asset related to goodwill is nondepreciable; rather, it simply states that goodwill itself is

will defer to a tax regulation so long as it "implement[s] the congressional mandate in some reasonable manner"); *National Muffler Dealers Assn., Inc.* v. *United States,* 440 U. S. 472, 477 (1979) (listing historical considerations that may give a regulation "particular force"); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 843–845 (1984) (reasonable agency interpretations of statutory provisions will be upheld).

I cannot deny, however, that the regulation would suffer real internal tension between its specific, categorical treatment of goodwill and its general analytical test (turning on the existence of a limited life of ascertainable duration), if modern accounting techniques were to develop a subtlety sufficient to make an accurate estimate of goodwill's useful life. Fortunately or not, however, the record in this case raises no such tension.

B

Even under Ledger's revision of the regulation, a depreciation deduction would depend on showing the Booth newspapers' goodwill to have a useful life both limited and measurable with some reasonable degree of certainty. The further step needed for victory is thus evidentiary in nature, and

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nondepreciable. Subject to this prohibition, the law concerning the depreciation of intangible assets related to goodwill has developed on a case-by-case basis, and the Government has accepted some of the distinctions that courts have drawn, including the principle that customer lists sold separately from a going business may be depreciable. See Brief for United States 36, n. 34; Rev. Rul. 74–456, 1974–2 Cum. Bull. 65, 66 (modifying earlier rulings "to remove any implication that customer and subscription lists, location contracts, insurance expirations, etc., are, as a matter of law, indistinguishable from goodwill"). Such matters are not at issue in this case, however, because the asset that Ledger seeks to depreciate is indistinguishable from goodwill. See 945 F. 2d 555, 568 (CA3 1991) (Newark Morning Ledger did not attempt, in this case, to claim a separate depreciation allowance for the subscriber lists it acquired).

Ledger's success or failure is solely a function of the evidentiary record. Ledger has failed.

Here, it is helpful to recall one defining characteristic of the only kind of asset Ledger claims to be entitled to depreciate: it must be an asset acquired from Booth Newspapers, Inc., upon the sale of its stock to Ledger's predecessor, Herald. If the goodwill is to be depreciated at all, in other words, it must be goodwill purchased, not goodwill attributable to anything occurring after the purchase date. It must be an expectation of continued patronage as it existed when the old Booth newspapers changed hands.

Assuming that there is a variety of goodwill that may be separately identified as an asset on the date of sale, some limitation on its useful life may be presumed. Whatever may be the force of habit, or inertia, that is valued as goodwill attributable to events occurring before the date of sale, the influence of those events wanes over time, and so must the habit or inertia by which that influence is made manifest and valued as goodwill. On the outside, the economically inert subscribers will prove to be physically mortal.[5]

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[5] While some courts have viewed goodwill as having an indefinite useful life, others have concluded that although goodwill does waste, its useful life cannot be determined with reasonable accuracy. Compare, *e. g., Red Wing Malting,* 15 F. 2d, at 633 (goodwill is not depreciable because it "does not suffer wear and tear, does not become obsolescent, [and] is not used up in the operation of the business"); *Patterson* v. *Commissioner,* 810 F. 2d 562, 569 (CA6 1987) (goodwill "does not waste"); *Houston Chronicle Publishing Co.* v. *United States,* 481 F. 2d 1240, 1248 (CA5 1973) (goodwill is "an ongoing asset that fluctuates but does not necessarily diminish"); *Landsberger* v. *McLaughlin,* 26 F. 2d 77, 78 (CA9 1928) (goodwill is not subject to exhaustion, wear or tear), with, *e. g., Dodge Brothers, Inc.* v. *United States,* 118 F. 2d 95, 100 (CA4 1941) (goodwill is not depreciable because of "manifest difficulties" inherent in estimating its life span); *Illinois Cereal Mills, Inc.* v. *Commissioner,* 46 TCM 1001, 1023 (1983), ¶ 83,469 P-H Memo TC (goodwill is not subject to depreciation "because [its] useful life is not susceptible of reasonable estimation").

What the Government does not concede,[6] however, and what Ledger has not proven, is the duration of that date-of-sale influence and consequent goodwill. Ledger, indeed, has not even purported to show that. Instead, its expert has estimated the quite different periods over which subscribers on the date of sale will continue to subscribe to the various papers.[7] In the District Court, Ledger offered a single witness for its claim to have estimated the useful life of each newspaper's "subscriber relationships" with reasonable accuracy. Herald had originally hired that witness, Dr. Gerald Glasser, to predict the average remaining lives of existing subscriptions to the eight Booth newspapers. See App. in

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[6] In an effort to insulate the case from review, Ledger asserts a concession by the Government below that the asset Ledger wants to depreciate did have a limited useful life that was estimated with reasonable accuracy. Brief for Petitioner 17, and n. 18. The majority does not go quite so far when it observes that "[p]etitioner's burden in this case was made significantly lighter by virtue of the Government's litigation strategy." *Ante*, at 567. In any event, the District Court's description of the Government's strategy makes it clear that the Government has not conceded this case away:

> "The parties have agreed that, if the Court determines that the paid subscribers constitute assets which were separate and apart from goodwill and which can be valued separate and apart from goodwill, and if the Court determines that the paid subscribers had useful lives which can be estimated with reasonable accuracy, then the paid subscribers of the Booth newspapers can be depreciated on a straight-line basis over the . . . useful lives [shown in the accompanying chart]." 734 F. Supp. 176, 180 (NJ 1990).

Thus, the factual concession by the Government came into play only after the District Court rejected two crucial legal arguments: (1) the "paid subscribers" asset is not an asset separate and distinct from goodwill, and (2) the asset did not have a useful life that could be estimated with reasonable accuracy. I find, for the reasons set out in the text, that the District Court erred in rejecting each argument. I also note that a similar litigating strategy did not prevent the Government from prevailing in *Haberle Springs*. See 280 U. S., at 386 ("The amount of the deduction to be made is agreed upon if any deduction is to be allowed").

[7] The estimates vary from paper to paper, but I refer to them in the singular, consistently with Ledger's claim to a singular "asset."

No. 90-5637 (CA3), p. 1010. Dr. Glasser testified that he first compiled statistics on the length of time existing subscribers had received each newspaper, by directing a survey that asked a selection of those subscribers one central question: "For how long has the [newspaper] been delivered to your present address?" *Id.*, at 157, 166, 182-183, 1012. He then made a crucial assumption, that the total number of subscriptions to each newspaper would remain stable over time. *Id.*, at 170-172, 187, 194-195. Finally, by subjecting the survey results to techniques of statistical analysis based on this crucial assumption, Dr. Glasser produced a series of figures that, he said, represented the average remaining life of existing subscriptions to each newspaper. Solely on the basis of Dr. Glasser's testimony, the District Court held that "the remaining useful lives of the paid subscribers of the Booth newspapers as of May 31, 1977, could be estimated with reasonable accuracy." 734 F. Supp. 176, 181 (NJ 1990).

Dr. Glasser's assumption is the key not only to the results he derived, but to the irrelevance of those results to the predictable life on the date of sale of the goodwill (or "paid subscribers") actually purchased from Booth. The key, in turn, to that irrelevance lies not in Dr. Glasser's explicit statement of his assumption, but in what the assumption itself presupposes. Since the District Court was not concerned with predicting the value that any given Booth newspaper might have in the future (as distinct from predicting the useful life of pre-existing subscriber goodwill), an assumption that the level of a paper's subscriptions would remain constant was useful only insofar as it had a bearing on predicting the behavior of the old subscribers. For this purpose, assuming a constant subscription level was a way of supposing that a given newspaper would remain as attractive to subscribers in the future as it had been during the period prior to the newspaper's sale. The assumption was thus a surrogate for the supposition that the new owners would not rock the boat and would succeed in acting intelligently to keep the paper, if not exactly as it had always been, at least as relatively attractive as it had been in relation to its various competitors on the date of sale.

What is significant about this assumption for present purposes is not its doubtful validity,[8] but the very fact of its being an assumption about the behavior of the paper's management after the date of sale. And since this assumption is the basis for a prediction about the life of subscriptions existing on the date of sale, that prediction is by definition not simply about the duration of subscriber goodwill (or habit or inertia) as it existed on the date the paper changed hands. On the contrary, it is a prediction about the combined effect of presale goodwill and postsale satisfaction with the paper as Ledger presumably continues to produce it. Nowhere in Dr. Glasser's testimony do we find an opinion that the presale goodwill has a life coextensive with the predicted life of the subscriptions, and nowhere do we find an opinion about the point at which the old goodwill finally peters out as a measurable, and hence valuable, influence on the old subscribers' behavior. It is not, of course, important for present purposes whether such an opinion would be possible, though I am skeptical that it would be.[9] But it is important that no such evidence exists in this case. In place of evidence showing the depreciable lifespan of date-of-sale goodwill with a reasonable degree of accuracy, Ledger has presented evidence of how long an old subscriber will remain one, on the assumption that the subscriber's prior satisfaction is confirmed, and (for all we know) replaced, with satisfaction resulting from Ledger's publishing performance over the years following its acquisition of a given newspaper.

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[8] No matter how much presale satisfaction subscribers have, it seems intuitively obvious that a high enough level of postsale dissatisfaction with a paper would drive subscribers away, as might other postsale events, such as successful competition and demographic changes. The District Court, relying on Ledger's own witnesses, noted several of the many possible reasons that lead subscribers to cancel their subscriptions:

"Subscribers are lost because of death, relocation, lack of reader time or interest, changing lifestyles, and other factors that are beyond the control of the newspapers. Also, subscribers are lost due to dissatisfaction with the product or service and for various other reasons, including competition from other media sources, such as radio, television, magazines and other paid-circulation and/or free-distribution newspapers." 734 F. Supp., at 180.

Ledger's statistician, in effect, made an assumption regarding Ledger's ability to manage the innumerable factors that keep current customers coming back for more, as well as its ability to attract new customers as the old ones leave. Such discretionary decisions may turn out to be foolish or wise: if foolish, the subscriber base as of the date of sale could be destroyed rapidly; if wise, it would be maintained. The simple recognition that some papers increase their subscriber base over time, while others lose it (and some actually fold), underscores the arbitrariness of the assumption made by Ledger's expert witness. In any event, Ledger has provided no evidence to support this assumption.

I do not, of course, suggest that a buyer's treatment of a depreciable asset does not affect the asset's actual useful life. A machine's less durable parts must be replaced; it must be oiled, kept from the weather, given fuel, and so on. But there is an identifiable object that endures through time and does not just disappear from inadequate maintenance. Goodwill, on the other hand, can be destroyed rapidly by everything from the nasty personality of a new proprietor to distaste for his publishing policies. Prediction of goodwill's endurance must always be fraught with a relatively high degree of chance, for discretionary decisions, rather than just ministerial acts (like oiling the gears), must be taken into account.

This, of course, misses the point entirely. In telling us merely how long a subscriber is likely to subscribe, Ledger tells us nothing about how long date-of-sale subscriber habit or inertia will remain a cause of predicted subscriber faithfulness. Since, however, only the date-of-sale probability of faithfulness could be entitled to depreciation as a purchased asset, Ledger's expert on his own terms has not even claimed to make the showing of definite duration necessary to depreciate an asset under § 167(a). Indeed, once duration of subscriptions and purchased goodwill are seen to be conceptually different, Ledger's claim to have satisfied the requirements for depreciating an intangible asset simply vanishes. Ledger's entire case thus rests on the confusion of subscription duration with goodwill on the date of sale, and only that confusion could suggest that Ledger has shouldered its burden of estimating the lifespan of the asset purchased from Booth. It is not surprising, then, that the Commissioner has stood by her categorical judgment that goodwill is not depreciable, that Congress has not disturbed this judgment,[10] and that lower courts have consistently agreed that goodwill is nondepreciable as a matter of law.

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[9] Goodwill results from such a mix of influences over time that it seems unlikely that the skein of them all could be untangled to identify the degree to which even present custom results from the goodwill purchased, as distinct from goodwill subsequently cultivated. Ledger has not even attempted such a disentanglement.

III

Because the Court of Appeals correctly reversed on the basis that Newark Morning Ledger failed to demonstrate that the asset it sought to depreciate was not goodwill, which is nondepreciable as a matter of law, see 945 F. 2d, at 568, I would affirm the judgment below. From the Court's holding to the contrary, I respectfully dissent.

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[10] The majority claims its approach to be "more faithful to the purposes of the Code," in allowing taxpayers to make a better match of expenses with revenues. *Ante*, at 565 (citing *INDOPCO, Inc.* v. *Commissioner*, 503 U. S. 79 (1992)). Such policy initiatives are properly left to Congress, which can modify the *per se* ban on depreciating goodwill at any time. Despite several recent opportunities to do so, Congress has so far refused to alter the tax treatment of goodwill and other intangibles. See, *e. g.*, H. R. 11, 102d Cong., 2d Sess., § 4501 (1992) (as returned from conference, Oct. 5, 1992) (proposing amortization of purchased goodwill and certain other intangible assets over a 14-year period); H. R. 4210, 102d Cong., 2d Sess., § 4501 (1992) (as returned from conference, Mar. 20, 1992) (same); H. R. 3040, 102d Cong., 2d Sess., § 302 (1992) (as returned from the Committee on Finance, June 19, 1992) (16-year period); H. R. 3035, 102d Cong., 1st Sess., § 1 (1991) (as introduced, July 25, 1991) (14-year period); see also H. Res. 292, 102d Cong., 1st Sess. (1991) (adopted Nov. 26, 1991, 137 Cong. Rec. H11317–H11318) (concerning the effective date of "any legislation enacted with respect to amortization of goodwill").

NEBRASKA *v.* WYOMING ET AL.

ON EXCEPTIONS TO REPORTS OF SPECIAL MASTER

No. 108, Orig. Argued January 13, 1993—Decided April 20, 1993

To resolve a dispute among Nebraska, Wyoming, Colorado, and the United States over water rights to the North Platte River, this Court entered a decree in 1945 imposing restrictions on storage and diversion by the upstream States, Colorado and Wyoming; establishing priorities among federal reservoirs and certain Nebraska canals; and apportioning 75% of the natural flow of the river's so-called "pivotal reach" during the irrigation season to Nebraska and 25% to Wyoming. *Nebraska* v. *Wyoming,* 325 U. S. 589. Initiating this original action in 1986, Nebraska petitioned the Court for an enforcement order and injunctive relief under the decree's "reopener" provision, alleging that Wyoming was violating or threatening to violate the decree by virtue of developments on two North Platte tributaries, Deer Creek and the Laramie River, and objecting to certain of Wyoming's actions with respect to the Inland Lakes in Nebraska. Wyoming answered and counterclaimed, arguing, essentially, that Nebraska was circumventing the decree by demanding and diverting water from above the Tri-State Dam for uses below Tri-State that are not recognized in the decree. All four parties have moved for summary judgment on one or more issues, and the Special Master has filed his First and Second Interim Reports recommending disposition of those motions and the intervention motions of certain *amici.* Exceptions have been filed by, *inter alios,* the three States.

Held:

1. No exceptions having been filed to the Master's recommendation that the Court deny the intervention motions, that recommendation is adopted. Pp. 589–590.

2. The Master's recommended dispositions of the summary judgment motions are adopted, and the parties' exceptions are overruled. Pp. 590–603.

(a) Although not strictly applicable, Federal Rule of Civil Procedure 56(c) and this Court's precedents construing it serve as useful guides to the summary judgment principles governing the case. Such judgment is appropriate under the Rule's terms when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether a material factual dispute exists, the evidence is viewed through the prism of the controlling legal standard, which will be markedly different depending on the type of proceedings. To the extent that the proceedings involve an application for *enforcement* of rights already recognized in a decree, as is the case here with respect to the Inland Lakes question, the plaintiff need not show injury. See, *e. g., Wyoming* v. *Colorado,* 309 U. S. 572, 581. However, if the plaintiff seeks *modification* of the decree to cover questions not decided in the original proceedings, as is the case with regard to Nebraska's tributary development claims, a showing of substantial injury must be made to warrant relief. Cf., *e. g., Idaho ex rel. Evans* v. *Oregon,* 462 U. S. 1017, 1027. Pp. 590–593.

(b) Summary judgment is granted to Nebraska and the United States on their requests for determinations that the decree entitles the Federal Bureau of Reclamation to continue its longstanding diversion and storage practices with respect to the Inland Lakes, and that the lakes have the same December 6, 1904, priority date as other original components of the Bureau's North Platte Project. The Court implicitly settled the lakes' priority in the prior litigation. See, *e. g.,* 325 U. S., at 646, 649, and n. 2. And even if the issue was not previously determined, Wyoming's arguments are foreclosed by its postdecree acquiescence in the Bureau's administration of the lakes. Cf. *Ohio* v. *Kentucky,* 410 U. S. 641, 648. Thus, Wyoming's motion for partial summary judgment that the Inland Lakes do not have storage rights under either state law or the decree is denied. Pp. 593–595.

(c) Wyoming's and Nebraska's motions for summary judgment with respect to their rights to Laramie River waters are denied. The Court rejects Wyoming's contention that those waters were completely apportioned between itself and Colorado by this Court's 1922 Laramie River decree. *Wyoming* v. *Colorado,* 259 U. S. 419, 496. Although Paragraph XII(d) of the 1945 decree expressly left undisturbed "[t]he apportionment heretofore made," the 1922 decree did not apportion *all* the Laramie's waters; it dealt only with flows down to and including a facility upstream of the new Laramie developments that Nebraska's petition challenges. Also rejected is Nebraska's claim that the 1945 decree's apportionment of pivotal reach waters includes Laramie flows that historically reached the North Platte. That decree did not restrict Wyoming's use of the Laramie or require it regularly to deliver a specified amount of Laramie water to the North Platte confluence, and, since 1945, neither Nebraska nor the United States has requested that Wyoming account for diversions above the confluence. Because the 1945 decree therefore did not decide the fate of the excess Laramie waters, affording Nebraska injunctive relief would constitute a modification of the decree. Unless Nebraska comes forward with evidence sufficient to establish that some project on the Laramie poses a threat of injury serious enough to warrant such a modification, summary judgment should be granted to Wyoming. Pp. 596–598.

(d) Wyoming's motion for summary judgment on Nebraska's challenge to a proposed new storage reservoir on Deer Creek is denied. It is unclear whether decree Paragraph X exempts from further review Wyoming's diversion of North Platte water for ordinary and usual municipal use. The Court need not adopt a definitive interpretation of Paragraph X, because the Deer Creek Project may not qualify as such a use. Furthermore, proof that the project will cause Nebraska substantial injury—which is necessary because the decree does not currently restrict Wyoming's use of Deer Creek, and a new injunction would constitute a modification of the decree—may depend on the way Wyoming administers the project, particularly with regard to its priority with the Inland Lakes. Pp. 599–601.

(e) Although most of Wyoming's, Nebraska's, and Colorado's requested rulings with respect to the below Tri-State issues are too theoretical and insufficiently developed to be susceptible of summary resolution at this time, partial summary judgment is granted to Nebraska on its request for a determination that the decree does not impose absolute ceilings on diversions by canals taking in the pivotal reach. Decree Paragraph V, which sets forth the apportionment of the pivotal reach, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit. Similarly, although Paragraph IV limits the extent to which Nebraska canals diverting in the pivotal reach may stop federal reservoirs in Wyoming from storing water, it does not place any restrictions on the quantities of water those canals may actually divert. Pp. 602–603.

Motions for leave to intervene denied, motions for summary judgment granted in part and denied in part, and exceptions to Special Master's Interim Reports overruled.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Dennis C. Cook, Senior Assistant Attorney General, argued the cause for defendant State of Wyoming. With him on the briefs were *Joseph B. Meyer*, Attorney General, and *Raphael J. Moses*, *Charles N. Woodruff*, and *James R. Montgomery*, Special Assistant Attorneys General. *Gale A. Norton*, Attorney General, argued the cause for defendant State of Colorado. With her on the brief were *Raymond T. Slaughter*, Chief Deputy Attorney General, *Timothy*

M. Tymkovich, Solicitor General, and *Wendy C. Weiss,* First Assistant Attorney General.

Richard A. Simms, Special Assistant Attorney General, argued the cause for plaintiff State of Nebraska. With him on the briefs were *Don Stenberg,* Attorney General, *Marie C. Pawol,* Assistant Attorney General, *James C. Brockmann,* and *Jay F. Stein.*

Jeffrey P. Minear argued the cause for the United States. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General O'Meara, Edwin S. Kneedler, Andrew F. Walch,* and *Patricia L. Weiss.**

JUSTICE O'CONNOR delivered the opinion of the Court.

In this original action we revisit the dispute among Nebraska, Wyoming, Colorado, and the United States over water rights to the North Platte River. In 1945, this Court entered a decree establishing interstate priorities on the North Platte and apportioning the natural flow of one critical portion of the river during the irrigation season. Nebraska returned to the Court in 1986 seeking an order for enforcement of the decree and injunctive relief. A Special Master, appointed by the Court, has supervised pretrial proceedings and discovery since 1987. Before us now are the Special Master's recommended dispositions of several summary judgment motions, together with exceptions filed to the Special Master's reports.

I

The North Platte River rises in northern Colorado and flows through Wyoming into Nebraska, where it joins the South Platte River. The topology of the river and the history of its early development are described at length in the Court's 1945 opinion. See *Nebraska* v. *Wyoming,* 325 U. S.

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*Briefs of *amici curiae* were filed for the Basin Electric Power Cooperative by *Edward Weinberg, Richmond F. Allan, Michael J. Hinman,* and *Claire Olson;* and for the National Audubon Society et al. by *Peter A. A. Berle* and *Abbe David Lowell.*

589, 592–599. In 1934, Nebraska, invoking this Court's original jurisdiction under Article III, § 2, of the Constitution, brought an action against Wyoming seeking an equitable apportionment of the North Platte. Colorado was impleaded as a defendant, and the United States intervened. After 11 years of litigation, the Court imposed restrictions on storage and diversion by the upstream States, 325 U. S., at 621–625, established priorities among federal storage reservoirs and certain canals, *id.*, at 625–637, and apportioned the so-called "pivotal" reach of the North Platte between Whalen, Wyoming, and the Tri-State Dam. The natural irrigation-season flows in that section of the river were apportioned 75% to Nebraska and 25% to Wyoming. *Id.*, at 637–654.

The Court directed the parties to formulate a decree to implement its decision. See *id.*, at 657. The resulting decree included a "reopener" provision, Paragraph XIII, that states, in relevant part:

> "Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
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> . . . . .
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> "(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
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> . . . . .
>
> "(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate." *Id.*, at 671–672.

Paragraph XIII reflects the Court's observation that the decree is designed to "deal with conditions as they obtain today" and that it "can be adjusted to meet . . . new conditions." *Id.*, at 620. The Court noted in more than one place in its opinion the need to retain jurisdiction to modify the decree in light of substantial changes in supply, threatened future development, or circumvention of the decree. See, *e. g., id.*, at 622, 625, 628–629. Since it was entered, the decree already has been modified once, pursuant to the parties' stipulation, to account for construction of a new reservoir. See *Nebraska* v. *Wyoming*, 345 U. S. 981 (1953).

In 1986, Nebraska petitioned the Court for relief under Paragraph XIII. Nebraska alleged that Wyoming was violating or threatening to violate the decree by virtue of developments on two North Platte tributaries, Deer Creek and the Laramie River. Nebraska also objected to certain actions taken by Wyoming with respect to the Inland Lakes in Nebraska. We granted Nebraska leave to file the petition. Wyoming answered and counterclaimed, arguing, essentially, that Nebraska was circumventing the decree by demanding and diverting water from above the Tri-State Dam for uses below Tri-State that are not recognized in the decree.

After we referred the matter to Special Master Owen Olpin, Wyoming moved for summary judgment. In his First Interim Report, the Master explained his decision to deny the motion but leave open the possibility of summary adjudication following further factual findings. See First Interim Report (June 14, 1989). An intensive period of discovery followed. All four parties then moved for summary judgment on one or more issues. A year later, the Special Master filed a Second Interim Report. See Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention (Apr. 9, 1992) (hereinafter Second Interim Report). The Master recommended that the Court deny the intervention motions of certain *amici*. No exceptions have been filed to this recommendation, and we adopt it. The Master also recommended that the Court grant summary judgment to Nebraska and the United States on the Inland Lakes issue, grant partial summary judgment to Nebraska on a discrete question related to the below Tri-State issues, and deny summary judgment on the remaining issues. Exceptions have been filed by Nebraska, Wyoming, Colorado, and *amicus* Basin Electric Power Cooperative (Basin). The United States has filed a brief opposing the exceptions. We agree with the Master's recommended dispositions of the summary judgment motions and accordingly overrule the exceptions.

II

At the outset we consider the legal principles governing the case. The parties do not challenge the summary judgment standards applied by the Special Master. The Master correctly observed that, although not strictly applicable, Rule 56(c) of the Federal Rules of Civil Procedure and our precedents construing that Rule serve as useful guides. See this Court's Rule 17.2. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. Rule Civ. Proc. 56(c). When the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to "make a showing sufficient to establish the existence of an element essential to [its] case." *Celotex Corp.* v. *Catrett,* 477 U. S. 317, 322 (1986). In determining whether a material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard. *Anderson* v. *Liberty Lobby, Inc.,* 477 U. S. 242, 248 (1986).

The disagreement in this case centers on the applicable legal standards. The question is whether these proceedings involve an application for *enforcement* of rights already recognized in the decree, or whether Nebraska seeks a *modification* of the decree. According to Wyoming, although the Court has jurisdiction to modify the decree under Paragraph

XIII, Nebraska obtained leave to file its petition on the assurance that the case would involve only enforcement of existing rights. In Wyoming's view, Nebraska subsequently, and improperly, transformed the case into a request for recognition of new rights—in essence, into a request for another equitable apportionment. If Nebraska is allowed to argue for modification of the decree, Wyoming and *amicus* Basin maintain, the same high evidentiary threshold applicable to claims for new apportionments applies. Under that standard, Nebraska can prevail only upon proof "by clear and convincing evidence" of "some real and substantial injury or damage." *Idaho ex rel. Evans* v. *Oregon,* 462 U. S. 1017, 1027 (1983). Accord, *Colorado* v. *Kansas,* 320 U. S. 383, 393 (1943); *Connecticut* v. *Massachusetts,* 282 U. S. 660, 669 (1931).

We do not read the pleadings as narrowly as does Wyoming. Nebraska's petition and supporting briefs do contain ambiguous language. See, *e. g.,* Petition for an Order Enforcing Decree and for Injunctive Relief 2 (Oct. 6, 1986) (hereinafter Petition) (alleging that Wyoming's actions violate the apportionment already "established in the Decree"); Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition 2 (Jan. 14, 1987) ("We do not propose to litigate anything new, but simply to protect what the Court has already decided"). But Nebraska also expressly invoked Paragraph XIII, and particularly subparagraphs (c) and (f). See Petition 3. As we have said, the Court in those sections retained jurisdiction to modify the decree to answer unresolved questions and to accommodate "change[s] in conditions"—a phrase sufficiently broad to encompass not only changes in water supply, see, *e. g., Nebraska* v. *Wyoming,* 325 U. S., at 620, but also new development that threatens a party's interests. Furthermore, nothing would prevent Nebraska from submitting a new petition if we deemed the original one deficient. We therefore decline the invitation, at this late date, to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings.

At the same time, we find merit in Wyoming's contention that, to the extent Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies. The two types of proceeding are markedly different. In an enforcement action, the plaintiff need not show injury. See, *e. g., Wyoming* v. *Colorado,* 309 U. S. 572, 581 (1940). When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree. To be sure, the right need not be stated explicitly in the decree. As the Master recognized, when the decree is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue. See, *e. g., Wyoming* v. *Colorado,* 286 U. S. 494, 506–508 (1932). The parties' course of conduct under the decree also may be relevant. But the underlying issue primarily remains one of interpretation. In a modification proceeding, by contrast, there is by definition no pre-existing right to interpret or enforce. At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment. See *Nebraska* v. *Wyoming, supra,* at 618 (listing equitable considerations).

As discussed below, we believe that the Inland Lakes question is fairly characterized as an enforcement issue. The claims regarding tributary development, however, raise questions not decided in the original proceedings and therefore may be best understood as requests for modification of the decree. The question remains what evidentiary standard applies to such claims. The Master evidently thought the high standard advocated by Wyoming inapplicable because this is not a case in which the Court is asked to interfere with state sovereign interests "in the first instance." Second Interim Report 13.

We disagree with the Master to this extent. Paragraph XIII perhaps eases a plaintiff's burden of establishing, as an initial matter, that a claim falling within its purview is "of that character and dignity which makes the controversy a justiciable one under our original jurisdiction." *Nebraska* v. *Wyoming,* 325 U. S., at 610. After all, a variety of changed conditions may "promis[e] to disturb the delicate balance of the river" created by the decree. *Id.,* at 625. But when the plaintiff essentially seeks a reweighing of equities and an injunction declaring new rights and responsibilities, we think the plaintiff still must make a showing of substantial injury to be entitled to relief. That is so not only because a new injunction would work a new infringement on sovereign prerogatives, but also because the interests of certainty and stability counsel strongly against reopening an apportionment of interstate water rights absent considerable justification. Cf. *Arizona* v. *California,* 460 U. S. 605, 615–628 (1983).

III

With these principles in mind, we turn to the summary judgment motions. To the extent that we agree with the Master, we have found it unnecessary to repeat in detail his careful evaluation of the voluminous evidence.

A

The Inland Lakes are four off-channel reservoirs in Nebraska served by the Interstate Canal, which diverts from the North Platte at Whalen, Wyoming. Both the Inland Lakes and the Interstate Canal are part of the North Platte Project, a series of reservoirs and canals operated by the United States Bureau of Reclamation (Bureau). Since 1913, the Bureau has diverted water through the Interstate Canal for storage in the Inland Lakes during nonirrigation months for release to Nebraska users during the irrigation season. Due to icing conditions on the Interstate Canal during the winter, the Bureau also temporarily has stored water destined for the Inland Lakes in the Guernsey and Glendo Reservoirs.

It appears that the Inland Lakes always have been operated with the December 6, 1904, priority date that Wyoming recognizes for other original components of the North Platte Project, even though the Bureau never obtained a separate Wyoming storage permit for the Inland Lakes. In 1986, however, Wyoming sued the Bureau in Wyoming state court, seeking to enjoin the Bureau from storing water in the Inland Lakes without a state permit and out of priority with other Wyoming users. (The action was subsequently removed to Federal District Court and dismissed without prejudice.) As the Master indicated, there is some reason to think that Wyoming wished to establish a post-1986 priority date for the Inland Lakes in order to increase the amount of North Platte water available for the new project on Deer Creek. At any rate, Nebraska (which was not a party to the Wyoming lawsuit) challenged Wyoming's actions in its petition to this Court.

Nebraska and the United States moved for summary judgment, seeking determinations that the decree entitles the Bureau to continue its longstanding diversion and storage practices and that the Inland Lakes have a priority date of December 6, 1904. Wyoming moved for partial summary judgment that the Inland Lakes do not have storage rights under either state law or the decree. The Special Master recommended that we grant the motions of Nebraska and the United States and deny Wyoming's motion. That the Bureau lacks a separate Wyoming permit for the Inland Lakes, he reasoned, is immaterial because the question of the Inland Lakes' priority was determined in the original proceedings. The decree did not explicitly establish the Inland Lakes' priority. But it is undisputed that the Court recognized a right to store 46,000 acre-feet of water in the Inland Lakes and, at Wyoming's suggestion, counted that amount to reduce Nebraska's requirement of natural flows in the pivotal reach. See Report of Michael J. Doherty, Special Master in *Nebraska* v. *Wyoming,* O. T. 1944, No. 4, pp. 60–61 (hereinafter Doherty Report); 325 U. S., at 646, 649, and n. 2. The Master therefore concluded that the Inland Lakes' priority was a necessary predicate of the apportionment and should not be disturbed. He also suggested that Wyoming's postdecree acquiescence in the Bureau's administration of the Inland Lakes should prevent Wyoming from challenging the 1904 priority date now.

We think the evidence from the prior litigation supports the conclusion that the Inland Lakes' priority was settled there. And even if the issue was not previously determined, we would agree with the Special Master that Wyoming's arguments are foreclosed by its postdecree acquiescence. Cf. *Ohio* v. *Kentucky,* 410 U. S. 641, 648 (1973) ("[P]roceedings under this Court's original jurisdiction are basically equitable in nature, and a claim not technically precluded nonetheless may be foreclosed by acquiescence" (citation omitted)). Accordingly, we clarify today that the Inland Lakes share a December 6, 1904, priority date with other original components of the North Platte Project. Pursuant to that priority, the Bureau has a right to divert 46,000 acre-feet of water during the nonirrigation season months of October, November, and April for storage in the Inland Lakes. Although the practice of storing Inland Lakes water temporarily in the Guernsey and Glendo Reservoirs was not established in 1945, the United States contends, and Wyoming apparently does not dispute, that the practice is necessary to ensure the delivery of the 46,000 acre-feet of water envisioned in the apportionment. For that reason we hold that the temporary storage practice also is protected. Our conclusion does not otherwise affect the rights of the Guernsey and Glendo Reservoirs under the decree.

B

The Laramie River originates in Colorado and meets the North Platte in Wyoming in the pivotal reach. In its petition, Nebraska challenged two new developments on the Laramie near the North Platte confluence. The first, Grayrocks Project, was completed in 1980. Operated by *amicus* Basin, it consists of Grayrocks Reservoir and an electric power generating plant. The second, Corn Creek Project, is a proposed irrigation system for Wyoming farmland.

Wyoming and Nebraska both moved for summary judgment, taking diametrically opposed positions with respect to their rights to Laramie waters. Nebraska claimed that the equitable apportionment of the water in the pivotal reach includes Laramie flows that historically have reached the North Platte. Wyoming contended that the waters of the Laramie are completely apportioned between Colorado and Wyoming by virtue of this Court's 1922 Laramie River decree, *Wyoming* v. *Colorado*, 259 U. S. 419, 496, modified, 260 U. S. 1, vacated and new decree entered, 353 U. S. 953 (1957), which the North Platte decree expressly left undisturbed.

Paragraph XII(d) of the North Platte decree does state that the decree "shall not affect . . . [t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River." 325 U. S., at 671; see also *id.*, at 592, n. 1 (Laramie decree "in no way affected" by North Platte decree). But we think the Master correctly concluded that Wyoming was not granted the right entirely to dewater the Laramie. The 1922 Laramie decree to which Paragraph XII(d) refers did not apportion *all* the waters of the Laramie; it dealt only with flows down to and including the Wheatland Project, a facility upstream of Grayrocks and Corn Creek. See *Wyoming* v. *Colorado*, 259 U. S., at 488.

There is a statement arguably to the contrary in a subsequent decision interpreting the 1922 decree. See *Wyoming* v. *Colorado*, 298 U. S. 573, 578 (1936) (decree establishes

Wyoming's right "to receive and divert . . . the remaining waters of the stream and its tributaries"). But we read that language to refer only to the waters actually apportioned in the earlier proceedings—that is, the waters down to and including Wheatland. There is also contrary language in the new Laramie decree entered on the joint motion of Wyoming and Colorado in 1957. See *Wyoming* v. *Colorado*, 353 U. S., at 953 (Wyoming "shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries"). But the 1957 decree, entered without Nebraska's participation, cannot affect our interpretation of the 1945 North Platte decree, since Paragraph XII(d) addresses only the Laramie apportionment "heretofore made"—in other words, the 1922 decree.

Further, the Court apparently expected that some Laramie water would contribute to the natural flows available for apportionment in the pivotal reach. See, *e. g.*, Doherty Report 67, Table III (including Laramie inflows in calculation of natural flow in pivotal reach). But the Court did not affirmatively apportion Laramie flows to Nebraska, either. The decree did not restrict Wyoming's use of the Laramie or require Wyoming regularly to deliver a specified amount of Laramie water to the North Platte confluence. Since 1945, Laramie flows that actually have reached the North Platte have been included in the equitable apportionment, but neither Nebraska nor the United States has requested that Wyoming account for diversions above the confluence. For these and other reasons given by the Special Master, we agree that the evidence, most fairly read, indicates that the Court did not decide the fate of the excess Laramie waters in 1945.

Because the North Platte decree gives Nebraska no rights to Laramie waters, affording Nebraska injunctive relief would constitute a modification of the decree. We turn, then, to the question of injury. In 1978, Nebraska entered into a settlement agreement with Basin and other parties (but not Wyoming) that limits Grayrocks' consumption of water and requires Basin to release certain minimum flows. The agreement also provides for further depletions in the event that Corn Creek is constructed. See Wyoming's App. to Brief in Opposition A–24 to A–32. At this juncture, Nebraska's argument seems to be that it will be injured if Wyoming interferes with Basin's mandatory minimum releases by allowing new Wyoming appropriators to divert from the Laramie between Grayrocks and the North Platte confluence.

Although Wyoming has declined to assure the Special Master that it will support Basin's obligation to maintain the minimum flows, see Second Interim Report 66–68, it is undisputed that Wyoming is not currently interfering with those flows. Other than Corn Creek, Nebraska points to no proposed development that might deplete releases from Grayrocks. Nor does Nebraska seem to argue that Grayrocks otherwise threatens its interests. The Master recommends that Paragraph XIII of the decree be amended expressly to indicate that Nebraska or the United States may apply for relief if Wyoming, in the future, threatens to interfere with the releases provided for in the settlement agreement. Because we do not believe such an amendment would add to our authority under subparagraph (f), we do not adopt this proposal. The Master also proposes to hold a status conference concerning Corn Creek. We have no objection to such a conference. We emphasize, however, that unless Nebraska comes forward with evidence sufficient to establish that Corn Creek (or some other project on the Laramie) poses a threat of injury serious enough to warrant modification of the decree, summary judgment should be entered in favor of Wyoming. We express no view as to whether, upon a proper showing of injury, incorporation of the settlement agreement into the North Platte decree would be appropriate.

C

Deer Creek enters the mainstem of the North Platte in Wyoming between the Pathfinder and Guernsey Reservoirs, upstream of the pivotal reach. Nebraska's petition challenged Wyoming's proposed construction of a new storage reservoir on Deer Creek. As we have said, in Paragraph XIII(c) of the decree the Court expressly retained jurisdiction to consider requests for further relief with respect to the effect of threatened construction of new storage capacity on tributaries entering the North Platte between Pathfinder and Guernsey. See 325 U. S., at 671.

Wyoming moved for summary judgment on alternative grounds. It asserted that the primary function of the Deer Creek Project will be to furnish municipal water supplies (by exchange) to Wyoming communities. Accordingly, Wyoming claimed that, Paragraph XIII(c) notwithstanding, the project is exempt from challenge by virtue of Paragraph X of the decree, which provides:

> "This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption." *Id.*, at 670.

Wyoming also contended that Nebraska had failed to make an adequate showing of injury.

Although admitting that Paragraph X "poses some mysteries," Second Interim Report 79, the Special Master evidently agreed with Wyoming that the plain language of that provision permits Wyoming freely to divert North Platte water for ordinary and usual municipal uses and that the other provisions of the decree act only upon the water remaining after such diversions. The Master declined to recommend summary judgment on this ground, however, due to factual questions concerning the Deer Creek Project's municipal character. The Master also recommended against summary judgment on the injury issue, based on an affidavit by H. Lee Becker, former state hydrologist for Nebraska. See Affidavit of H. Lee Becker ¶ 2 (Apr. 25, 1991) (stating that the project would cause reductions in the average year-end carryover storage of federal reservoirs on the North Platte and that "[s]uch reductions . . . could limit diversions in the [pivotal] reach in a series of dry years"), attached to Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment and to Basin Electric's Memorandum in Support Thereof (Apr. 25, 1991).

Nebraska objects strenuously to the Master's interpretation of Paragraph X. The United States has not filed exceptions but agrees that the Master's interpretation is "problematic." Brief for United States Opposing Exceptions 35 (Aug. 17, 1992) (hereinafter U. S. Brief). We, too, are troubled by Paragraph X. As the Master pointed out, the parties to the original proceedings fought mightily over small quantities of water. It is therefore unclear why they and the Court would have meant that the upstream States could make municipal diversions of any magnitude, in derogation of the careful system of interstate priorities established under the decree, without the opportunity for further review.

We nonetheless think it unnecessary to settle upon a definitive interpretation of Paragraph X at this time. The Special Master rightly observed that the Deer Creek Project may not qualify as an ordinary and usual municipal use. Although Wyoming recently has promised to operate the project solely for municipal purposes, both the Final Environmental Impact Statement prepared for the project—which describes a plan of operation that the project may be obliged to follow—and the state permit identify nonmunicipal uses. Nebraska also has presented evidence that the communities that the Deer Creek Project is to serve do not need additional municipal supplies, and that, even if they did, there are more cost-effective alternatives than the proposed reservoir.

In addition, Nebraska may be unable to prove that operation of the Deer Creek Project will cause it substantial injury. Such proof is necessary, as we have indicated, because the decree does not currently restrict Wyoming's use of Deer Creek, and a new injunction would constitute a modification of the decree. Whether the project will injure Nebraska may depend on the way it is administered.

Wyoming has conceded that the Deer Creek Project will be operated in accordance with state law and in priority with the Glendo and Guernsey Reservoirs. It has not agreed, however, to operate the project junior to the Inland Lakes, perhaps because its position throughout the litigation has been that the Inland Lakes lack a priority date. In light of our recognition today that the decree establishes a 1904 priority date for the Inland Lakes, it is unclear whether Wyoming will persist in seeking to operate the Deer Creek Project out of priority. If the project is operated junior to the Inland Lakes, the evidence of injury to Nebraska appears to be diminished. See Affidavit of H. Lee Becker ¶¶ 4–6 (Aug. 12, 1988) (demonstrating that anticipated reductions in federal reservoirs' carryover storage would be smaller if Inland Lakes' priority were recognized), attached to Nebraska's Response to Wyoming's Motion for Summary Judgment (Aug. 22, 1988); Affidavit of David G. Wilde ¶ 89(b) (Aug. 15, 1988) (stating that, although Deer Creek would "substantially impac[t]" federal projects during an extended dry period, impacts would be "minimized" if Deer Creek were administered junior to the Inland Lakes), attached to Response of United States to Wyoming's Motion for Summary Judgment (Aug. 23, 1988). But Wyoming still may assert that Paragraph X permits it to divert for municipal uses out of priority with the Inland Lakes. In that event, we think the Wilde and Becker affidavits raise a genuine issue of material fact sufficient to defeat Wyoming's summary judgment motion.

D

In its counterclaim, Wyoming alleged that Nebraska was violating the decree by demanding natural flows and storage water from sources above the Tri-State Dam and diverting those waters to uses below Tri-State that are not recognized in the decree. Wyoming also alleged that Nebraska was improperly demanding North Platte flows for diversion by canals at and above Tri-State Dam in excess of the irrigation requirements of the Nebraska lands entitled to water under the decree. Increased diversions by the Nebraska canals above Tri-State evidently benefit users below Tri-State because they create increased return flows.

Neither Wyoming nor Nebraska sought summary judgment on Wyoming's counterclaim. Rather, both States and Colorado have sought a number of more limited rulings with respect to the below Tri-State issues. We agree with the Master that most of these claims are "'too theoretical and not sufficiently anchored to concrete pleadings or an adequately developed factual [r]ecord'" to be susceptible of summary resolution at this time. Second Interim Report 92 (quoting Post-Argument Comments of United States 6 (July 29, 1991)). We further agree that one issue is sufficiently crystallized to warrant partial summary judgment for Nebraska.

Nebraska requested a determination that the decree does not impose absolute ceilings on diversions by canals taking in the pivotal reach. As the Master explained, the irrigation requirements of the lands the canals serve were calculated in the prior proceedings. But the requirements were calculated for the purpose of determining the appropriate apportionment of the pivotal reach, not to impose a cap on the canals' total diversions, either individually or cumulatively. See Doherty Report 161 ("[T]he findings herein as to *requirements* cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree" (emphasis in original)). Paragraph V of the decree, which sets forth the apportionment, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit. See 325 U. S., at 667.

In Wyoming's view, Paragraph IV of the decree requires a different result. The Master properly rejected this argument. Paragraph IV establishes the priority of Nebraska canals diverting in the pivotal reach relative to federal projects in Wyoming. See *id.*, at 666–667. We agree with the United States that, although Paragraph IV "limits the extent to which the Nebraska canals may stop federal reservoirs from storing water, [it] does not place any 'absolute ceilings' or other restrictions on the quantities of water those canals may actually divert." U. S. Brief 40, n. 21. Wyoming asks us to clarify that the federal reservoirs have no obligation to bypass natural flow to a senior Nebraska canal when the canal is making excessive calls for federal storage water. Because there is as yet inadequate factual development on the question whether Nebraska canals have in fact made excessive calls, we decline to do so.

IV

For the foregoing reasons, all of the exceptions filed to the Special Master's reports are overruled. The summary judgment motions of Nebraska and the United States regarding the Inland Lakes' priority date are granted, as is Nebraska's partial summary judgment motion with respect to the issue of canal diversion limitations. All other summary judgment motions are denied.

It is so ordered.

HAZEN PAPER CO. ET AL. *v.* BIGGINS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 91-1600. Argued January 13, 1993—Decided April 20, 1993

Petitioners fired respondent Biggins when he was 62 years old and apparently a few weeks short of the years of service he needed for his pension to vest. In his ensuing lawsuit, a jury found, *inter alia*, a willful violation of the Age Discrimination in Employment Act of 1967 (ADEA), which gave rise to liquidated damages. The District Court granted petitioners' motion for judgment notwithstanding the verdict on the "willfulness" finding, but the Court of Appeals reversed, giving considerable emphasis to evidence of pension interference in upholding ADEA liability and finding that petitioners' conduct was willful because, under the standard of *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 128, they knew or showed reckless disregard for the matter of whether their conduct contravened the ADEA.

Held:

1. An employer does not violate the ADEA by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service. In a disparate treatment case, liability depends on whether the protected trait—under the ADEA, age—actually motivated the employer's decision. When that decision is wholly motivated by factors other than age, the problem that prompted the ADEA's passage—inaccurate and stigmatizing stereotypes about older workers' productivity and competence—disappears. Thus, it would be incorrect to say that a decision based on years of service—which is analytically distinct from age—is necessarily age based. None of this Court's prior decisions should be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect. The foregoing holding does not preclude the possibility of liability where an employer uses pension status as a proxy for age, of dual liability under the Employee Retirement Income Security Act of 1974 and the ADEA, or of liability where vesting is based on age rather than years of service. Because the Court of Appeals cited additional evidentiary support for ADEA liability, this case is remanded for that court to reconsider whether the jury had sufficient evidence to find such liability. Pp. 608–614.

2. The *Thurston* "knowledge or reckless disregard" standard for liquidated damages applies not only where the predicate ADEA violation is a formal, facially discriminatory policy, as in *Thurston*, but also where it is an informal decision by the employer that was motivated by the employee's age. Petitioners have not persuaded this Court that *Thurston* was wrongly decided or that the Court should part from the rule of *stare decisis*. Applying the *Thurston* standard to cases of individual discrimination will not defeat the two-tiered system of liability intended by Congress. Since the ADEA affords an employer a "bona fide occupational qualification" defense, and exempts certain subject matters and persons, an employer could incorrectly but in good faith and nonrecklessly believe that the statute permits a particular age-based decision. Nor is there some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word "willful." The distinction between the formal, publicized policy in *Thurston* and the undisclosed factor here is not such a difference, since an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut *against* imposing a penalty. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision. Pp. 614–617.

953 F. 2d 1405, vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 617.

Robert B. Gordon argued the cause for petitioners. With him on the briefs were *John M. Harrington, Jr.*, and *John H. Mason.*

Maurice M. Cahillane, Jr., argued the cause for respondent. With him on the briefs were *John J. Egan, Edward J. McDonough, Jr.*, and *Eileen Z. Sorrentino.*

John R. Dunne argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General Starr, Deputy Solicitor Gen-*

eral Roberts, Edward C. DuMont, Donald R. Livingston, and *Gwendolyn Young Reams.**

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we clarify the standards for liability and liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*

I

Petitioner Hazen Paper Company manufactures coated, laminated, and printed paper and paperboard. The company is owned and operated by two cousins, petitioners Robert Hazen and Thomas N. Hazen. The Hazens hired respondent Walter F. Biggins as their technical director in 1977. They fired him in 1986, when he was 62 years old.

Respondent brought suit against petitioners in the United States District Court for the District of Massachusetts, alleging a violation of the ADEA. He claimed that age had been a determinative factor in petitioners' decision to fire him. Petitioners contested this claim, asserting instead that respondent had been fired for doing business with competitors of Hazen Paper. The case was tried before a jury, which rendered a verdict for respondent on his ADEA claim and also found violations of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 895, § 510, 29 U. S. C. § 1140, and state law. On the ADEA count, the jury specifically found that petitioners "willfully" violated the statute. Under § 7(b) of the ADEA, 29 U. S. C. § 626(b), a "willful" violation gives rise to liquidated damages.

**Robert E. Williams, Douglas S. McDowell,* and *Mona C. Zeiberg* filed a brief for the Equal Employment Advisory Council et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Steven S. Zaleznick* and *Cathy Ventrell-Monsees;* and for the National Employment Lawyers Association by *Paul H. Tobias.*

Petitioners moved for judgment notwithstanding the verdict. The District Court granted the motion with respect to a state-law claim and the finding of "willfulness" but otherwise denied it. An appeal ensued. 953 F. 2d 1405 (CA1 1992). The United States Court of Appeals for the First Circuit affirmed judgment for respondent on both the ADEA and ERISA counts, and reversed judgment notwithstanding the verdict for petitioners as to "willfulness."

In affirming the judgments of liability, the Court of Appeals relied heavily on the evidence that petitioners had fired respondent in order to prevent his pension benefits from vesting. That evidence, as construed most favorably to respondent by the court, showed that the Hazen Paper pension plan had a 10-year vesting period and that respondent would have reached the 10-year mark had he worked "a few more weeks" after being fired. *Id.*, at 1411. There was also testimony that petitioners had offered to retain respondent as a consultant to Hazen Paper, in which capacity he would not have been entitled to receive pension benefits. *Id.*, at 1412. The Court of Appeals found this evidence of pension interference to be sufficient for ERISA liability, *id.*, at 1416, and also gave it considerable emphasis in upholding ADEA liability. After summarizing all the testimony tending to show age discrimination, the court stated:

> "Based on the foregoing evidence, the jury could reasonably have found that Thomas Hazen decided to fire [respondent] before his pension rights vested and used the confidentiality agreement [that petitioners had asked respondent to sign] as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire [respondent]. If it were not for [respondent's] age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. [Respondent] was fifty-two years old when he was hired; his pension rights vested in ten years." *Id.*, at 1412.

As to the issue of "willfulness" under § 7(b) of the ADEA, the Court of Appeals adopted and applied the definition set out in *Trans World Airlines, Inc.* v. *Thurston,* 469 U. S. 111 (1985). In *Thurston,* we held that the airline's facially discriminatory job-transfer policy was not a "willful" ADEA violation because the airline neither "knew [nor] showed reckless disregard for the matter of whether" the policy contravened the statute. *Id.,* at 128 (internal quotation marks omitted). The Court of Appeals found sufficient evidence to satisfy the *Thurston* standard, and ordered that respondent be awarded liquidated damages equal to and in addition to the underlying damages of $419,454.38. 953 F. 2d, at 1415–1416.

We granted certiorari to decide two questions. 505 U. S. 1203 (1992). First, does an employer's interference with the vesting of pension benefits violate the ADEA? Second, does the *Thurston* standard for liquidated damages apply to the case where the predicate ADEA violation is not a formal, facially discriminatory policy, as in *Thurston,* but rather an informal decision by the employer that was motivated by the employee's age?

II

A

The Courts of Appeals repeatedly have faced the question whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age. Compare *White* v. *Westinghouse Electric Co.,* 862 F. 2d 56, 62 (CA3 1988) (firing of older employee to prevent vesting of pension benefits violates ADEA); *Metz* v. *Transit Mix, Inc.,* 828 F. 2d 1202 (CA7 1987) (firing of older employee to save salary costs resulting from seniority violates ADEA), with *Williams* v. *General Motors Corp.,* 656 F. 2d 120, 130, n. 17 (CA5 1981) ("[S]eniority and age discrimination are unrelated. . . . We state without equivocation that the seniority a given plaintiff has accumulated entitles him to no better or worse treatment in an age discrimination suit"), cert. denied, 455 U. S. 943 (1982); *EEOC* v. *Clay Printing Co.,* 955 F. 2d 936, 942 (CA4 1992) (emphasizing distinction between employee's age and years of service). We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.

We long have distinguished between "disparate treatment" and "disparate impact" theories of employment discrimination.

> "'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> "[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Teamsters* v. *United States,* 431 U. S. 324, 335–336, n. 15 (1977) (citation omitted) (construing Title VII of Civil Rights Act of 1964).

The disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear. "It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age.*" 29 U. S. C. § 623(a)(1) (emphasis added). See *Thurston, supra,* at 120–125 (affirming ADEA liability under disparate treatment theory). By contrast, we have never decided whether a disparate impact theory of liability is available under the ADEA, see *Markham* v. *Geller,* 451 U. S. 945 (1981) (REHNQUIST, J., dissenting from denial of certiorari), and we need not do so here. Respondent claims only that he received disparate treatment.

In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision. See, *e. g., United States Postal Service Bd. of Governors* v. *Aikens,* 460 U. S. 711 (1983); *Texas Dept. of Community Affairs* v. *Burdine,* 450 U. S. 248, 252–256 (1981); *Furnco Constr. Corp.* v. *Waters,* 438 U. S. 567, 576–578 (1978). The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. See, *e. g., Thurston, supra; Los Angeles Dept. of Water and Power* v. *Manhart,* 435 U. S. 702, 704–718 (1978). Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. See, *e. g., Anderson* v. *Bessemer City,* 470 U. S. 564 (1985); *Teamsters, supra,* at 334–343. Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome.

Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in *EEOC* v. *Wyoming,* 460 U. S. 226 (1983), Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.

> "Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsup-

> ported by objective fact . . . . Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers." *Id.*, at 231.

Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 422 (1985). The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or "vested," once the employee completes a certain number of years of service with the employer. See 1 J. Mamorsky, Employee Benefits Law § 5.03 (1992). On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, see 29 U. S. C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

The instant case is illustrative. Under the Hazen Paper pension plan, as construed by the Court of Appeals, an employee's pension benefits vest after the employee completes 10 years of service with the company. Perhaps it is true that older employees of Hazen Paper are more likely to be "close to vesting" than younger employees. Yet a decision by the company to fire an older employee solely because he has nine-plus years of service and therefore is "close to vesting" would not constitute discriminatory treatment on the basis of age. The prohibited stereotype ("Older employees are likely to be ——") would not have figured in this decision, and the attendant stigma would not ensue. The decision would not be the result of an inaccurate and denigrating generalization about age, but would rather represent an *accurate* judgment about the employee—that he indeed is "close to vesting."

We do not mean to suggest that an employer *lawfully* could fire an employee in order to prevent his pension benefits from vesting. Such conduct is actionable under § 510 of ERISA, as the Court of Appeals rightly found in affirming judgment for respondent under that statute. See *Ingersoll-Rand Co.* v. *McClendon,* 498 U. S. 133, 142–143 (1990). But it would not, without more, violate the ADEA. That law requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore. Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper *in any respect,* see *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973) (creating proof framework applicable to ADEA) (employer must have "legitimate, nondiscriminatory reason" for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.

We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, cf. *Metz,* 828 F. 2d, at 1208 (using "proxy" to mean statutory equivalence), but in the sense that the employer may suppose a correlation between the two factors and act accordingly. Nor do we rule out the possibility of dual liability under ERISA and the ADEA where the decision to fire the employee was motivated both by the employee's age and by his pension status. Finally, we do not consider the special case where an employee is about to vest in pension benefits as a result of his *age,* rather than years of service, see 1 Mamorsky, *supra,* at § 5.02[2], and the employer fires the employee in order to prevent vesting. That case is not presented here. Our holding is simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service.

Besides the evidence of pension interference, the Court of Appeals cited some additional evidentiary support for ADEA liability. Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. 953 F. 2d, at 1411. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision—here, that respondent had been disloyal to Hazen Paper by doing business with its competitors—is " 'unworthy of credence.' " *Aikens,* 460 U. S., at 716 (quoting *Burdine,* 450 U. S., at 256). But inferring age motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, see *Hicks* v. *St. Mary's Honor Center,* 970 F. 2d 487 (CA8 1992), cert. granted, 506 U. S. 1042 (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation.

B

Because we remand for further proceedings, we also address the second question upon which certiorari was granted: the meaning of "willful" in § 7(b) of the ADEA, which provides for liquidated damages in the case of a "willful" violation.

In *Thurston,* we thoroughly analyzed § 7(b) and concluded that "a violation of the Act [would be] 'willful' if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U. S., at 126 (internal quotation marks and ellipsis omitted). We sifted through the legislative history of § 7(b), which had derived from § 16(a) of the Fair Labor Standards Act of 1938 (FLSA), 52 Stat. 1069, as amended, 29 U. S. C. § 216(a), and determined that the accepted judicial interpretation of § 16(a) at the time of the passage of the ADEA supported the "knowledge or reckless disregard" standard. See 469 U. S., at 126. We found that this standard was consistent with the meaning of "willful" in other criminal and civil statutes. See *id.,* at 126–127. Finally, we observed that Congress aimed to create a "two-tiered liability scheme," under which some, but not all, ADEA violations would give rise to liquidated damages. We therefore rejected a broader definition of "willful" providing for liquidated damages whenever the employer knew that the ADEA was "in the picture." See *id.,* at 127–128.

In *McLaughlin* v. *Richland Shoe Co.,* 486 U. S. 128 (1988), an FLSA case, we reaffirmed the *Thurston* standard. The question in *Richland Shoe* was whether the limitations provision of the FLSA, creating a 3-year period for "willful" violations, should be interpreted consistently with *Thurston.* We answered that question in the affirmative.

> "The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—is surely a fair reading of the plain language of the Act." 486 U. S., at 133.

Once again we rejected the "in the picture standard" because it would "virtually obliterat[e] any distinction between willful and nonwillful violations." *Id.,* at 132–133.

Surprisingly, the Courts of Appeals continue to be confused about the meaning of the term "willful" in § 7(b) of the ADEA. A number of Circuits have declined to apply *Thurston* to what might be called an informal disparate treatment case—where age has entered into the employment decision on an ad hoc, informal basis rather than through a formal policy. At least one Circuit refuses to impose liquidated damages in such a case unless the employer's conduct was "outrageous." See, *e. g., Lockhart* v. *Westinghouse Credit Corp.,* 879 F. 2d 43, 57–58 (CA3 1989). Another requires that the underlying evidence of liability be direct rather than circumstantial. See, *e. g., Neufeld* v. *Searle Laboratories,* 884 F. 2d 335, 340 (CA8 1989). Still others have insisted that age be the "predominant," rather than simply a determinative, factor. See, *e. g., Spulak* v. *K Mart Corp.,* 894 F. 2d 1150, 1159 (CA10 1990); *Schrand* v. *Federal Pacific Elec. Co.,* 851 F. 2d 152, 158 (CA6 1988). The chief concern of these Circuits has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct.

We believe that this concern is misplaced. The ADEA does not provide for liquidated damages "where consistent with the principle of a two-tiered liability scheme." It provides for liquidated damages where the violation was "willful." That definition must be applied here unless we overrule *Thurston,* or unless there is some inherent difference between this case and *Thurston* to cause a shift in the meaning of the word "willful."

As for the first possibility, petitioners have not persuaded us that *Thurston* was wrongly decided, let alone that we should depart from the rule of *stare decisis.* The two-tiered liability principle was simply one interpretive tool among several that we used in *Thurston* to decide what Congress meant by the word "willful," and in any event we continue to believe that the "knowledge or reckless disregard" standard will create two tiers of liability across the range of ADEA cases. It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, see 29 U. S. C. § 623(f)(1), and exempts certain subject matters and persons, see, *e. g.,* § 623(f)(2) (exemption for bona fide seniority systems and employee benefit plans); § 631(c) (exemption for bona fide executives and high policymakers). If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed. See *Richland Shoe, supra,* at 135, n. 13. Indeed, in *Thurston* itself we upheld liability but *reversed* an award of liquidated damages because the employer "acted [nonrecklessly] and in good faith in attempting to determine whether [its] plan would violate the ADEA." 469 U. S., at 129.

Nor do we see how the instant case can be distinguished from *Thurston,* assuming that petitioners did indeed fire respondent because of his age. The only distinction between *Thurston* and the case before us is the existence of formal discrimination. Age entered into the employment decision there through a formal and publicized policy, and not as an undisclosed factor motivating the employer on an ad hoc basis, which is what respondent alleges occurred here. But surely an employer's reluctance to acknowledge its reliance on the forbidden factor should not cut *against* imposing a penalty. It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages. We therefore reaffirm that the *Thurston* definition of "willful"—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring.

I agree with the Court that the Court of Appeals placed improper reliance on respondent's evidence of pension interference and that the standard for determining willfulness announced in *Trans World Airlines, Inc.* v. *Thurston,* 469 U. S. 111 (1985), applies to individual acts of age discrimination as well as age discrimination manifested in formal, companywide policy. I write to underscore that the only claim based upon the Age Discrimination in Employment Act (ADEA), 29 U. S. C. § 621 *et seq.*, asserted by respondent in this litigation is that petitioners discriminated against him because of his age. He has advanced no claim that petitioners' use of an employment practice that has a disproportionate effect on older workers violates the ADEA. See App. 29–30 (amended complaint); 5 Record 71–76 (jury instructions). As a result, nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called "disparate impact" theory of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000e to 2000e–17. As the Court acknowledges, *ante*, at 610, we have not yet addressed the question whether such a claim is cognizable under the ADEA, and there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA. See *Markham* v. *Geller*, 451 U. S. 945 (1981) (REHNQUIST, J., dissenting from denial of certiorari); *Metz* v. *Transit Mix, Inc.*, 828 F. 2d 1202, 1216–1220 (CA7 1987) (Easterbrook, J., dissenting); Note, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837 (1982). It is on the understanding that the Court does not reach this issue that I join in its opinion.

BRECHT *v.* ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91–7358. Argued December 1, 1992—Decided April 21, 1993

At his first-degree murder trial in Wisconsin state court, petitioner Brecht admitted shooting the victim, but claimed it was an accident. In order to impeach this testimony, the State, *inter alia,* made several references to the fact that, before he was given his *Miranda* warnings at an arraignment, Brecht failed to tell anyone with whom he came in contact that the shooting was accidental. The State also made several references to his post-*Miranda*-warning silence in this regard. The jury returned a guilty verdict and Brecht was sentenced to life in prison, but the State Court of Appeals set the conviction aside on the grounds that the State's references to his post-*Miranda* silence violated due process under *Doyle* v. *Ohio,* 426 U. S. 610, and this error was sufficiently "prejudicial" to require reversal. The State Supreme Court reinstated the conviction, holding that the error was "'harmless beyond a reasonable doubt'" under the standard set forth in *Chapman* v. *California,* 386 U. S. 18, 24. The Federal District Court disagreed and set aside the conviction on habeas review. In reversing, the Court of Appeals held that the proper standard of harmless-error review was that set forth in *Kotteakos* v. *United States,* 328 U. S. 750, 776, *i. e.,* whether the *Doyle* violation "'had substantial and injurious effect or influence in determining the jury's verdict.'" Applying this standard, the court concluded that Brecht was not entitled to relief.

Held:

1. The *Kotteakos* harmless-error standard, rather than the *Chapman* standard, applies in determining whether habeas relief must be granted because of unconstitutional "trial error" such as the *Doyle* error at issue. Pp. 627–638.

(a) The State's references to Brecht's post-*Miranda* silence violated *Doyle.* The *Doyle* rule rests on the *Miranda* warnings' implicit assurance that a suspect's silence will not be used against him, and on the fundamental unfairness of using postwarning silence to impeach an explanation subsequently offered at trial. It is conceivable that, once Brecht was given his warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial. The prosecution's references to his pre-*Miranda* silence were, however, entirely proper. Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. Pp. 627–629.

(b) *Doyle* error fits squarely into the category of constitutional violations characterized by this Court as "trial error." See *Arizona* v. *Fulminante*, 499 U. S. 279, 307. Such error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence to determine its effect on the trial. See *id.*, at 307–308. This Court has consistently applied the *Chapman* standard in reviewing claims of constitutional error of the trial type on direct review of state and federal criminal proceedings. Pp. 629–630.

(c) It is for the Court to determine what harmless-error standard applies on collateral review of Brecht's *Doyle* claim. Although the Court has applied the *Chapman* standard in a handful of federal habeas cases, *stare decisis* does not preclude adoption of the *Kotteakos* standard here, since the decisions in question never squarely addressed, but merely assumed, *Chapman*'s applicability on collateral review. Nor has Congress provided express guidance on the question. The federal habeas statute is silent as to the applicable standard, and while the federal harmless-error statute appears to echo the *Kotteakos* standard, it has been limited in its application to claims of nonconstitutional error in federal criminal cases. In line with the traditional rule, the Court finds no reason to draw inferences from Congress' failure to enact post-*Chapman* proposals that would have provided a less stringent harmless-error standard on collateral review of constitutional error. Pp. 630–633.

(d) The *Kotteakos* standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and is more likely to promote the considerations underlying this Court's recent habeas jurisprudence. In recognition of the historical distinction between direct review as the principal way to challenge a conviction and collateral review as an extraordinary remedy whose role is secondary and limited, the Court has often applied different standards on habeas than on direct review. It scarcely seems logical to require federal habeas courts to engage in the same approach that *Chapman* requires of state courts on direct review, since the latter courts are fully qualified to identify constitutional error and are often better situated to evaluate its prejudicial effect on the trial process. Absent affirmative evidence that state-court judges are ignoring their oath, Brecht's argument is unpersuasive that such courts will respond to the application of *Kotteakos* on federal habeas by violating their Article VI duty to uphold the Constitution. In any event, the additional deterrent effect, if any, of applying *Chapman* on federal habeas is outweighed by the costs of that application, which undermines the States' interest in finality and infringes upon their sovereignty over criminal matters; is at odds with habeas' purpose of affording relief only to those grievously wronged; imposes significant "social costs," including the expenditure of additional time and resources by all of the parties, the erosion of memory and the dispersion of witnesses, and the frustration of society's interest in the prompt administration of justice; and results in retrials that take place much later than those following reversal on direct appeal. This imbalance of costs and benefits counsels in favor of application of the less onerous *Kotteakos* standard on collateral review, under which claimants are entitled to relief for trial error only if they can establish that "actual prejudice" resulted. See *United States* v. *Lane*, 474 U. S. 438, 449. Because the *Kotteakos* standard is grounded in the federal harmless-error rule (28 U. S. C. § 2111), federal courts may turn to an existing body of case law and, thus, are unlikely to be confused in applying it. Pp. 633–638.

2. It is clear that the *Doyle* error at Brecht's trial did not "substantially influence" the jury's verdict within the meaning of *Kotteakos*, since the record, considered as a whole, demonstrates that the State's references to Brecht's post-*Miranda* silence were infrequent and were, in effect, merely cumulative of the extensive and permissible references to his pre-*Miranda* silence; that the evidence of his guilt was, if not overwhelming, certainly weighty; and that circumstantial evidence also pointed to his guilt. Thus, Brecht is not entitled to habeas relief. Pp. 638–639.

944 F. 2d 1363, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 639. WHITE, J., filed a dissenting opinion, in which BLACKMUN, J., joined, and in which SOUTER, J., joined except for the footnote and Part III, *post*, p. 644. BLACKMUN, *post*, p. 650, O'CONNOR, *post*, p. 650, and SOUTER, JJ., *post*, p. 657, filed dissenting opinions.

Allen E. Shoenberger, by appointment of the Court, 505 U. S. 1202, argued the cause and filed briefs for petitioner.

Sally L. Wellman, Assistant Attorney General of Wisconsin, argued the cause for respondent. With her on the brief was *James E. Doyle*, Attorney General.

Attorney General Barr argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Starr, Assistant Attorney General*

Mueller, Deputy Solicitor General Roberts, Ronald J. Mann, and *Vicki S. Marani.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Chapman* v. *California,* 386 U. S. 18, 24 (1967), we held that the standard for determining whether a conviction must be set aside because of federal constitutional error is whether the error "was harmless beyond a reasonable doubt." In this case we must decide whether the *Chapman* harmless-error standard applies in determining whether the

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**Steven R. Shapiro, John A. Powell, Leon Friedman,* and *Larry W. Yackle* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren,* Attorney General of California, *George Williamson,* Chief Assistant Attorney General, *Dane R. Gillette,* Deputy Attorney General, and *Mark L. Krotoski,* Special Assistant Attorney General, *James H. Evans,* Attorney General of Alabama, *Charles E. Cole,* Attorney General of Alaska, *Winston Bryant,* Attorney General of Arkansas, *Gale A. Norton,* Attorney General of Colorado, *Richard N. Palmer,* Chief State's Attorney of Connecticut, *Larry EchoHawk,* Attorney General of Idaho, *Linley E. Pearson,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, *Chris Gorman,* Attorney General of Kentucky, *Richard P. Ieyoub,* Attorney General of Louisiana, *Frank J. Kelley,* Attorney General of Michigan, *Michael C. Moore,* Attorney General of Mississippi, *William L. Webster,* Attorney General of Missouri, *Marc Racicot,* Attorney General of Montana, *Don Stenberg,* Attorney General of Nebraska, *Frankie Sue Del Papa,* Attorney General of Nevada, *Robert J. Del Tufo,* Attorney General of New Jersey, *Lee Fisher,* Attorney General of Ohio, *Ernest D. Preate, Jr.,* Attorney General of Pennsylvania, *T. Travis Medlock,* Attorney General of South Carolina, *Mark Barnett,* Attorney General of South Dakota, *Dan Morales,* Attorney General of Texas, *Paul Van Dam,* Attorney General of Utah, *Jeffrey L. Amestoy,* Attorney General of Vermont, *Kenneth O. Eikenberry,* Attorney General of Washington, *Mario J. Palumbo,* Attorney General of West Virginia, and *Joseph B. Meyer,* Attorney General of Wyoming; for the County of Wayne, Michigan, by *John D. O'Hair* and *Timothy A. Baughman;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

prosecution's use for impeachment purposes of petitioner's post-*Miranda*[1] silence, in violation of due process under *Doyle* v. *Ohio,* 426 U. S. 610 (1976), entitles petitioner to habeas corpus relief. We hold that it does not. Instead, the standard for determining whether habeas relief must be granted is whether the *Doyle* error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States,* 328 U. S. 750, 776 (1946). The *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence. Applying this standard, we conclude that petitioner is not entitled to habeas relief.

Petitioner Todd A. Brecht was serving time in a Georgia prison for felony theft when his sister and her husband, Molly and Roger Hartman, paid the restitution for petitioner's crime and assumed temporary custody of him. The Hartmans brought petitioner home with them to Alma, Wisconsin, where he was to reside with them before entering a halfway house. This caused some tension in the Hartman household because Roger Hartman, a local district attorney, disapproved of petitioner's heavy drinking habits and homosexual orientation, not to mention his previous criminal exploits. To make the best of the situation, though, the Hartmans told petitioner, on more than one occasion, that he was not to drink alcohol or engage in homosexual activities in their home. Just one week after his arrival, however, petitioner violated this house rule.

While the Hartmans were away, petitioner broke into their liquor cabinet and began drinking. He then found a rifle in an upstairs room and began shooting cans in the backyard. When Roger Hartman returned home from work, petitioner shot him in the back and sped off in Mrs. Hartman's car.

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[1] *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

Hartman crawled to a neighbor's house to summon help. (The downstairs phone in the Hartmans' house was inoperable because petitioner had taken the receiver on the upstairs phone off the hook.) Help came, but Hartman's wound proved fatal. Meanwhile, petitioner had driven Mrs. Hartman's car into a ditch in a nearby town. When a police officer stopped to offer assistance, petitioner told him that his sister knew about his car mishap and had called a tow truck. Petitioner then hitched a ride to Winona, Minnesota, where he was stopped by police. At first he tried to conceal his identity, but he later identified himself and was arrested. When he was told that he was being held for the shooting, petitioner replied that "it was a big mistake" and asked to talk with "somebody that would understand [him]." App. 39, 78. Petitioner was returned to Wisconsin, and thereafter was given his *Miranda* warnings at an arraignment.

Then petitioner was charged with first-degree murder. At trial in the Circuit Court for Buffalo County, he took the stand and admitted shooting Hartman, but claimed it was an accident. According to petitioner, when he saw Hartman pulling into the driveway on the evening of the shooting, he ran to replace the gun in the upstairs room where he had found it. But as he was running toward the stairs in the downstairs hallway, he tripped, causing the rifle to discharge the fatal shot. After the shooting, Hartman disappeared, so petitioner drove off in Mrs. Hartman's car to find him. Upon spotting Hartman at his neighbor's door, however, petitioner panicked and drove away.

The State argued that petitioner's account was belied by the fact that he had failed to get help for Hartman, fled the Hartmans' home immediately after the shooting, and lied to the police officer who came upon him in the ditch about having called Mrs. Hartman. In addition, the State pointed out that petitioner had failed to mention anything about the shooting being an accident to the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who eventually arrested him. Over the objections of defense counsel, the State also asked petitioner during cross-examination whether he had told anyone at any time before trial that the shooting was an accident, to which petitioner replied "no," and made several references to petitioner's pretrial silence during closing argument.[2] Finally, the State offered extrinsic evidence tending to contradict petitioner's story, including the path the bullet traveled through Mr. Hartman's body (horizontal to slightly downward) and the location where the rifle was found after the shooting (outside), as well as evidence of motive (petitioner's hostility toward Mr. Hartman because of his disapproval of petitioner's sexual orientation).

The jury returned a guilty verdict, and petitioner was sentenced to life imprisonment. The Wisconsin Court of

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[2] The State's cross-examination of petitioner included the following exchange:

"Q. In fact the first time you have ever told this story is when you testified here today was it not?

. . . . .

"A. You mean the story of actually what happened?

"Q. Yes.

"A. I knew what happened, I'm just telling it the way it happened, yes, I didn't have a chance to talk to anyone, I didn't want to call somebody from a phone and give up my rights, so I didn't want to talk about it, no sir." App. 22–23.

Then on re-cross-examination, the State further inquired:

"Q. Did you tell anyone about what had happened in Alma?

"A. No I did not." *Id.*, at 23.

During closing argument, the State urged the jury to "remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence . . . ." *Id.*, at 30. It also made the following statement with regard to petitioner's pretrial silence: "He sits back here and sees all of our evidence go in and then he comes out with this crazy story . . . ." *Id.*, at 31. Finally, during its closing rebuttal, the State said: "I know what I'd say [had I been in petitioner's shoes], I'd say, 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story." *Id.*, at 36.

Appeals set the conviction aside on the ground that the State's references to petitioner's post-*Miranda* silence, see n. 2, *supra,* violated due process under *Doyle* v. *Ohio,* 426 U. S. 610 (1976), and that this error was sufficiently "prejudicial" to require reversal. *State* v. *Brecht,* 138 Wis. 2d 158, 168–169, 405 N. W. 2d 718, 723 (1987). The Wisconsin Supreme Court reinstated the conviction. Although it agreed that the State's use of petitioner's post-*Miranda* silence was impermissible, the court determined that this error " 'was harmless beyond a reasonable doubt.' " *State* v. *Brecht,* 143 Wis. 2d 297, 317, 421 N. W. 2d 96, 104 (1988) (quoting *Chapman* v. *California,* 386 U. S. 18, 24 (1967)). In finding the *Doyle* violation harmless, the court noted that the State's "improper references to Brecht's silence were infrequent," in that they "comprised less than two pages of a 900 page transcript, or a few minutes in a four day trial in which twenty-five witnesses testified," and that the State's evidence of guilt was compelling. 143 Wis. 2d, at 317, 421 N. W. 2d, at 104.

Petitioner then sought a writ of habeas corpus under 28 U. S. C. §2254, reasserting his *Doyle* claim. The District Court agreed that the State's use of petitioner's post-*Miranda* silence violated *Doyle,* but disagreed with the Wisconsin Supreme Court that this error was harmless beyond a reasonable doubt, and set aside the conviction. 759 F. Supp. 500 (WD Wis. 1991). The District Court based its harmless-error determination on its view that the State's evidence of guilt was not "overwhelming," and that the State's references to petitioner's post-*Miranda* silence, though "not extensive," were "crucial" because petitioner's defense turned on his credibility. *Id.,* at 508. The Court of Appeals for the Seventh Circuit reversed. It, too, concluded that the State's references to petitioner's post-*Miranda* silence violated *Doyle,* but it disagreed with both the standard that the District Court had applied in conducting its harmless-error inquiry and the result it reached. 944 F. 2d 1363, 1368, 1375–1376 (1991).

The Court of Appeals held that the *Chapman* harmless-error standard does not apply in reviewing *Doyle* error on federal habeas. Instead, because of the "prophylactic" nature of the *Doyle* rule, 944 F. 2d, at 1370, as well as the costs attendant to reversing state convictions on collateral review, *id.*, at 1373, the Court of Appeals held that the standard for determining whether petitioner was entitled to habeas relief was whether the *Doyle* violation "'had substantial and injurious effect or influence in determining the jury's verdict,'" 944 F. 2d, at 1375 (quoting *Kotteakos* v. *United States*, 328 U. S., at 776). Applying this standard, the Court of Appeals concluded that petitioner was not entitled to relief because, "given the many more, and entirely proper, references to [petitioner's] silence preceding arraignment," he could not contend with a "straight face" that the State's use of his post-*Miranda* silence had a "substantial and injurious effect" on the jury's verdict. 944 F. 2d, at 1376.

We granted certiorari to resolve a conflict between Courts of Appeals on the question whether the *Chapman* harmless-error standard applies on collateral review of *Doyle* violations, 504 U. S. 972 (1992),[3] and now affirm.

We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence requires reversal of his murder conviction. Petitioner urges us to even the count, and decide matters in his favor once and for all. He argues that the *Chapman* harmless-error standard applies with equal force on collateral review of *Doyle* error. According to petitioner, the need to prevent state courts from relaxing their standards on direct review of *Doyle* claims, and the confusion which would ensue were we to adopt the *Kotteakos* harmless-error standard on collateral review, require application of the *Chapman* standard here. Before considering these arguments, however, we must first characterize the nature of *Doyle* error itself.

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[3] Cf. *Bass* v. *Nix*, 909 F. 2d 297 (CA8 1990) (The *Chapman* harmless-error standard governs in reviewing *Doyle* violations on collateral review).

In *Doyle* v. *Ohio*, 426 U. S., at 619, we held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment." This rule "rests on 'the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial.'" *Wainwright* v. *Greenfield,* 474 U. S. 284, 291 (1986) (quoting *South Dakota* v. *Neville,* 459 U. S. 553, 565 (1983)). The "implicit assurance" upon which we have relied in our *Doyle* line of cases is the right-to-remain-silent component of *Miranda.* Thus, the Constitution does not prohibit the use for impeachment purposes of a defendant's silence prior to arrest, *Jenkins* v. *Anderson,* 447 U. S. 231, 239 (1980), or after arrest if no *Miranda* warnings are given, *Fletcher* v. *Weir,* 455 U. S. 603, 606–607 (1982) *(per curiam).* Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty. See 447 U. S., at 239.

This case illustrates the point well. The first time petitioner claimed that the shooting was an accident was when he took the stand at trial. It was entirely proper—and probative—for the State to impeach his testimony by pointing out that petitioner had failed to tell anyone before the time he received his *Miranda* warnings at his arraignment about the shooting being an accident. Indeed, if the shooting was an accident, petitioner had every reason—including to clear his name and preserve evidence supporting his version of the events—to offer his account immediately following the shooting. On the other hand, the State's references to petitioner's silence after that point in time, or more generally to petitioner's failure to come forward with his version of events at any time before trial, see n. 2, *supra*, crossed the *Doyle* line. For it is conceivable that, once petitioner had been given his *Miranda* warnings, he decided to stand on his right to remain silent because he believed his silence would not be used against him at trial.

The Court of Appeals characterized *Doyle* as "a prophylactic rule." 944 F. 2d, at 1370. It reasoned that, since the need for *Doyle* stems from the implicit assurance that flows from *Miranda* warnings, and "the warnings required by *Miranda* are not themselves part of the Constitution," "*Doyle* is . . . a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." *Ibid.* But *Doyle* was not simply a further extension of the *Miranda* prophylactic rule. Rather, as we have discussed, it is rooted in fundamental fairness and due process concerns. However real these concerns, *Doyle* does not "'overprotec[t]'" them. *Duckworth* v. *Eagan*, 492 U. S. 195, 209 (1989) (O'CONNOR, J., concurring). Under the rationale of *Doyle*, due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence. *Doyle* thus does not bear the hallmarks of a prophylactic rule.

Instead, we think *Doyle* error fits squarely into the category of constitutional violations which we have characterized as "'trial error.'" See *Arizona* v. *Fulminante*, 499 U. S. 279, 307 (1991). Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Id.*, at 307–308. At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.*, at 309. The existence of such defects—deprivation of the right to counsel,[4] for example—requires automatic reversal of the conviction because they infect the entire trial process. See *id.*, at 309–310. Since our landmark decision in *Chapman* v. *California*, 386 U. S. 18 (1967), we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the trial type.

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[4] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

In *Chapman*, we considered whether the prosecution's reference to the defendants' failure to testify at trial, in violation of the Fifth Amendment privilege against self-incrimination,[5] required reversal of their convictions. We rejected the argument that the Constitution requires a blanket rule of automatic reversal in the case of constitutional error, and concluded instead that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless." *Id.*, at 22. After examining existing harmless-error rules, including the federal rule (28 U. S. C. §2111), we held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U. S., at 24. The State bears the burden of proving that an error passes muster under this standard.

Chapman reached this Court on direct review, as have most of the cases in which we have applied its harmless-error standard. Although we have applied the *Chapman* standard in a handful of federal habeas cases, see, *e. g., Yates* v. *Evatt*, 500 U. S. 391 (1991); *Rose* v. *Clark*, 478 U. S. 570 (1986); *Milton* v. *Wainwright*, 407 U. S. 371 (1972); *Anderson* v. *Nelson*, 390 U. S. 523 (1968) *(per curiam)*, we have yet squarely to address its applicability on collateral review.[6]

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[5] *Griffin* v. *California*, 380 U. S. 609 (1965).

[6] In *Greer* v. *Miller*, 483 U. S. 756 (1987), we granted certiorari to consider the same question presented here but did not reach this question because we concluded that no *Doyle* error had occurred in that case. See 483 U. S., at 761, n. 3, 765. But see *id.*, at 768 (STEVENS, J., concurring in judgment) ("I believe the question presented in the certiorari petition—

Petitioner contends that we are bound by these habeas cases, by way of *stare decisis,* from holding that the *Kotteakos* harmless-error standard applies on habeas review of *Doyle* error. But since we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits. See *Edelman* v. *Jordan,* 415 U. S. 651, 670–671 (1974).

The federal habeas corpus statute is silent on this point. It permits federal courts to entertain a habeas petition on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States," 28 U. S. C. § 2254(a), and directs simply that the court "dispose of the matter as law and justice require," § 2243. The statute says nothing about the standard for harmless-error review in habeas cases. Respondent urges us to fill this gap with the *Kotteakos* standard, under which an error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States,* 328 U. S., at 776. This standard is grounded in the federal harmless-error statute. 28 U. S. C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties").[7] On its face § 2111 might seem to address the situ-

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whether a federal court should apply a different standard in reviewing *Doyle* errors *in a habeas corpus action*—should be answered in the affirmative") (emphasis in original).

[7] In *Kotteakos,* we construed § 2111's statutory predecessor, 28 U. S. C. § 391 (1925–1926 ed.). Section 391 provided: "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." In formulating § 391's harmless-error standard, we focused on the phrase "affect the substantial rights of the parties," and held

ation at hand, but to date we have limited its application to claims of nonconstitutional error in federal criminal cases. See, *e. g., United States* v. *Lane,* 474 U. S. 438 (1986).

Petitioner asserts that Congress' failure to enact various proposals since *Chapman* was decided that would have limited the availability of habeas relief amounts to legislative disapproval of application of a less stringent harmless-error standard on collateral review of constitutional error. Only one of these proposals merits discussion here. In 1972, a bill was proposed that would have amended 28 U. S. C. § 2254 to require habeas petitioners to show that "'a different result would probably have obtained if such constitutional violation had not occurred.'" 118 Cong. Rec. 24936 (1972) (quoting S. 3833, 92d Cong., 2d Sess. (1972)). In response, the Attorney General suggested that the above provision be modified to make habeas relief available only where the petitioner "'suffered a substantial deprivation of his constitutional rights at his trial.'" 118 Cong. Rec. 24939 (1972) (quoting letter from Richard G. Kleindienst, Attorney General, to Emanuel Celler, Chairman of the House Committee on the Judiciary (June 21, 1972)). This language of course parallels the federal harmless-error rule. But neither the Attorney General's suggestion nor the proposed bill itself was ever enacted into law.

As a general matter, we are "reluctant to draw inferences from Congress' failure to act." *Schneidewind* v. *ANR Pipeline Co.,* 485 U. S. 293, 306 (1988) (citing *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.,* 387 U. S. 397,

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that the test was whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U. S., at 776. Although Congress tinkered with the language of § 391 when it enacted § 2111 in its place in 1949, Congress left untouched the phrase "affect the substantial rights of the parties." Thus, the enactment of § 2111 did not alter the basis for the harmless-error standard announced in *Kotteakos.* If anything, Congress' deletion of the word "technical," makes § 2111 more amenable to harmless-error review of constitutional violations. Cf. *United States* v. *Hasting,* 461 U. S. 499, 509–510, n. 7 (1983).

416–418 (1967)); *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381, n. 11 (1969)). We find no reason to depart from this rule here. In the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review of petitioner's *Doyle* claim. We have filled the gaps of the habeas corpus statute with respect to other matters, see, *e. g., McCleskey* v. *Zant,* 499 U. S. 467, 487 (1991); *Wainwright* v. *Sykes,* 433 U. S. 72, 81 (1977); *Sanders* v. *United States,* 373 U. S. 1, 15 (1963); *Townsend* v. *Sain,* 372 U. S. 293, 312–313 (1963), and find it necessary to do so here. As always, in defining the scope of the writ, we look first to the considerations underlying our habeas jurisprudence, and then determine whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review.

The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. See, *e. g., Wright* v. *West,* 505 U. S. 277, 292–293 (1992) (opinion of THOMAS, J.); *Teague* v. *Lane,* 489 U. S. 288, 306 (1989) (opinion of O'CONNOR, J.); *Pennsylvania* v. *Finley,* 481 U. S. 551, 556–557 (1987); *Mackey* v. *United States,* 401 U. S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Direct review is the principal avenue for challenging a conviction. "When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Barefoot* v. *Estelle,* 463 U. S. 880, 887 (1983).

In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, "a bulwark against convictions that violate 'fundamental fairness.'" *Engle* v. *Isaac,* 456 U. S. 107, 126 (1982) (quoting *Wainwright* v. *Sykes, supra,* at 97 (STEVENS, J., concurring)). "Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay* v. *Noia,* 372 U. S. 391, 440–441 (1963). See also *Kuhlmann* v. *Wilson,* 477 U. S. 436, 447 (1986) (plurality opinion) ("The Court uniformly has been guided by the proposition that the writ should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice") (quoting *Fay* v. *Noia, supra,* at 440–441); *Jackson* v. *Virginia,* 443 U. S. 307, 332, n. 5 (1979) (STEVENS, J., concurring in judgment) (Habeas corpus "is designed to guard against extreme malfunctions in the state criminal justice systems"). Accordingly, it hardly bears repeating that "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *United States* v. *Frady,* 456 U. S. 152, 165 (1982) (quoting *United States* v. *Addonizio,* 442 U. S. 178, 184 (1979)).[8]

Recognizing the distinction between direct and collateral review, we have applied different standards on habeas than would be applied on direct review with respect to matters other than harmless-error analysis. Our recent retroactivity jurisprudence is a prime example. Although new rules always have retroactive application to criminal cases on direct review, *Griffith* v. *Kentucky,* 479 U. S. 314, 320–328 (1987), we have held that they seldom have retroactive application to criminal cases on federal habeas, *Teague* v. *Lane, supra,* at 305–310 (opinion of O'CONNOR, J.). Other examples abound throughout our habeas cases. See, *e. g., Pennsylvania* v.

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[8] For instance, we have held that an error of law does not provide a basis for habeas relief under 28 U. S. C. § 2255 unless it constitutes "'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States* v. *Timmreck,* 441 U. S. 780, 783 (1979) (quoting *Hill* v. *United States,* 368 U. S. 424, 428 (1962)).

Finley, 481 U. S. 551, 555–556 (1987) (Although the Constitution guarantees the right to counsel on direct appeal, *Douglas* v. *California,* 372 U. S. 353, 355 (1963), there is no "right to counsel when mounting collateral attacks"); *United States* v. *Frady, supra,* at 162–169 (While the federal "plain error" rule applies in determining whether a defendant may raise a claim for the first time on direct appeal, the "cause and prejudice" standard applies in determining whether that same claim may be raised on habeas); *Stone* v. *Powell,* 428 U. S. 465, 489–496 (1976) (Claims under *Mapp* v. *Ohio,* 367 U. S. 643 (1961), are not cognizable on habeas as long as the state courts have provided a full and fair opportunity to litigate them at trial or on direct review).

The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. See, *e. g., Wright* v. *West, supra,* at 293 (opinion of THOMAS, J.); *McCleskey* v. *Zant,* 499 U. S., at 491; *Wainwright* v. *Sykes,* 433 U. S., at 90. We have also spoken of comity and federalism. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle* v. *Isaac, supra,* at 128. See also *Coleman* v. *Thompson,* 501 U. S. 722, 748 (1991); *McCleskey, supra,* at 491. Finally, we have recognized that "[l]iberal allowance of the writ . . . degrades the prominence of the trial itself," *Engle, supra,* at 127, and at the same time encourages habeas petitioners to relitigate their claims on collateral review, see *Rose* v. *Lundy,* 455 U. S. 509, 547 (1982) (STEVENS, J., dissenting).

In light of these considerations, we must decide whether the same harmless-error standard that the state courts applied on direct review of petitioner's *Doyle* claim also applies in this habeas proceeding. We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence in this case requires reversal of his conviction. Each court that has reviewed the record has disagreed with the court before it as to whether the State's *Doyle* error was "harmless." State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman,* and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. See *Rushen* v. *Spain,* 464 U. S. 114, 120 (1983) *(per curiam).* For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review.

Petitioner argues that application of the *Chapman* harmless-error standard on collateral review is necessary to deter state courts from relaxing their own guard in reviewing constitutional error and to discourage prosecutors from committing error in the first place. Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner's argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution. See *Robb* v. *Connolly,* 111 U. S. 624, 637 (1884). Federalism, comity, and the constitutional obligation of state and federal courts all counsel against any presumption that a decision of this Court will "deter" lower federal or state courts from fully performing their sworn duty. See *Engle, supra,* at 128; *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 263–265 (1973) (Powell, J., concurring). In any event, we think the costs of applying the *Chapman* standard on federal habeas outweigh the additional deterrent effect, if any, that would be derived from its application on collateral review.

Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a "'reasonable possibility'" that trial error contributed to the verdict, see *Chapman* v. *California*, 386 U. S., at 24 (quoting *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963)), is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has "grievously wronged." Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice." *United States* v. *Mechanik*, 475 U. S. 66, 72 (1986) (internal quotation marks omitted). And since there is no statute of limitations governing federal habeas, and the only laches recognized is that which affects the State's ability to defend against the claims raised on habeas, retrials following the grant of habeas relief ordinarily take place much later than do retrials following reversal on direct review.

The imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error. The *Kotteakos* standard, we believe, fills the bill. The test under *Kotteakos* is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." 328 U. S., at 776. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice." See *United States* v. *Lane*, 474 U. S. 438, 449 (1986). The *Kotteakos* standard is thus better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases. Moreover, because the *Kotteakos* standard is grounded in the federal harmless-error rule, 28 U. S. C. § 2111, federal courts may turn to an existing body of case law in applying it. Therefore, contrary to the assertion of petitioner, application of the *Kotteakos* standard on collateral review is unlikely to confuse matters for habeas courts.

For the foregoing reasons, then, we hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type.[9] All that remains to be decided is whether petitioner is entitled to relief under this standard based on the State's *Doyle* error. Because the Court of Appeals applied the *Kotteakos* standard below, we proceed to this question ourselves rather than remand the case for a new harmless-error determination. Cf. *Yates* v. *Evatt,* 500 U. S. 391, 407 (1991). At trial, petitioner admitted shooting Hartman, but claimed it was an accident. The principal question before the jury, therefore, was whether the State met its burden in proving beyond a reasonable doubt that the shooting was intentional. Our inquiry here is whether, in light of the record as a whole, the State's improper use for impeachment purposes of petitioner's post-*Miranda* silence, see n. 2, *supra,* "had substantial and injurious effect or influence in determining the jury's verdict." We think it clear that it did not.

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[9] Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict. Cf. *Greer* v. *Miller,* 483 U. S. 756, 769 (1987) (STEVENS, J., concurring in judgment). We, of course, are not presented with such a situation here.

The State's references to petitioner's post-*Miranda* silence were infrequent, comprising less than two pages of the 900-page trial transcript in this case. And in view of the State's extensive and permissible references to petitioner's pre-*Miranda* silence—*i. e.*, his failure to mention anything about the shooting being an accident to the officer who found him in the ditch, the man who gave him a ride to Winona, or the officers who eventually arrested him—its references to petitioner's post-*Miranda* silence were, in effect, cumulative. Moreover, the State's evidence of guilt was, if not overwhelming, certainly weighty. The path of the bullet through Mr. Hartman's body was inconsistent with petitioner's testimony that the rifle had discharged as he was falling. The police officers who searched the Hartmans' home found nothing in the downstairs hallway that could have caused petitioner to trip. The rifle was found outside the house (where Hartman was shot), not inside where petitioner claimed it had accidently fired, and there was a live round rammed in the gun's chamber, suggesting that petitioner had tried to fire a second shot. Finally, other circumstantial evidence, including the motive proffered by the State, also pointed to petitioner's guilt.

In light of the foregoing, we conclude that the *Doyle* error that occurred at petitioner's trial did not "substantial[ly] . . . influence" the jury's verdict. Petitioner is therefore not entitled to habeas relief, and the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, concurring.

The Fourteenth Amendment prohibits the deprivation of liberty "without due process of law"; that guarantee is the source of the federal right to challenge state criminal convictions that result from fundamentally unfair trial proceedings. Neither the term "due process," nor the concept of fundamental unfairness itself, is susceptible of precise and categorical definition, and no single test can guarantee that a judge will grant or deny habeas relief when faced with a similar set of facts. Every allegation of due process denied depends on the specific process provided, and it is familiar learning that all "claims of constitutional error are not fungible." *Rose* v. *Lundy,* 455 U. S. 509, 543 (1982) (STEVENS, J., dissenting). As the Court correctly notes, constitutional due process violations vary dramatically in significance; harmless trial errors are at one end of a broad spectrum, and what the Court has characterized as "structural" defects—those that make a trial fundamentally unfair even if they do not affect the outcome of the proceeding—are at "the other end of the spectrum," *ante,* at 629. Although Members of the Court have disagreed about the seriousness of the due process violation identified in *Doyle* v. *Ohio,* 426 U. S. 610 (1976), in this case we unanimously agree that a constitutional violation occurred; moreover, we also all agree that some version of harmless-error analysis is appropriate.

We disagree, however, about whether the same form of harmless-error analysis should apply in a collateral attack as on a direct appeal, and, if not, what the collateral attack standard should be for an error of this kind. The answer to the first question follows from our long history of distinguishing between collateral and direct review, see, *e. g., Sunal* v. *Large,* 332 U. S. 174, 178 (1947), and confining collateral relief to cases that involve fundamental defects or omissions inconsistent with the rudimentary demands of fair procedure, see, *e. g., United States* v. *Timmreck,* 441 U. S. 780, 783 (1979), and cases cited therein. The Court answers the second question by endorsing Justice Rutledge's thoughtful opinion for the Court in *Kotteakos* v. *United States,* 328 U. S. 750 (1946). *Ante,* at 623, 638. Because that standard accords with the statutory rule for reviewing other trial errors that affect substantial rights; places the burden on prosecutors to explain why those errors were harmless; requires a habeas court to review the entire record *de novo* in determining whether the error influenced the jury's deliberations; and leaves considerable latitude for the exercise of judgment by federal courts, I am convinced that our answer is correct. I write separately only to emphasize that the standard is appropriately demanding.

As the Court notes, *ante,* at 631–632, n. 7, the *Kotteakos* standard is grounded in the 1919 federal harmless-error statute. Congress had responded to the widespread concern that federal appellate courts had become "impregnable citadels of technicality," *Kotteakos,* 328 U. S., at 759, by issuing a general command to treat error as harmless unless it "is of such a character that its natural effect is to prejudice a litigant's substantial rights," *id.,* at 760–761. *Kotteakos* plainly stated that unless an error is merely "technical," the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution.[1] A constitutional violation, of course, would never fall in the "technical" category.

Of particular importance, the statutory command requires the reviewing court to evaluate the error in the context of the entire trial record. As the Court explained: "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of

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[1] "It is also important to note that the purpose of the bill in its final form was stated authoritatively to be 'to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights, otherwise they are to be disregarded.' H. R. Rep. No. 913, 65th Cong., 3d Sess., 1. But that this burden does not extend to all errors appears from the statement which follows immediately. 'The proposed legislation affects only technical errors. If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation rest upon the one who claims under it.' *Ibid.; Bruno* v. *United States,* [308 U. S. 287, 294 (1939)]; *Weiler* v. *United States,* 323 U. S. 606, 611 [(1945)]." *Kotteakos* v. *United States,* 328 U. S., at 760–761.

stare decisis by what has been done in similar situations." *Id.*, at 762.

To apply the *Kotteakos* standard properly, the reviewing court must, therefore, make a *de novo* examination of the trial record. The Court faithfully engages in such *de novo* review today, see *ante*, at 638–639, just as the plurality did in the dispositive portion of its analysis in *Wright* v. *West*, 505 U. S. 277, 295–297 (1992) (opinion of THOMAS, J.). The *Kotteakos* requirement of *de novo* review of errors that prejudice substantial rights—as all constitutional errors surely do—is thus entirely consistent with the Court's longstanding commitment to the *de novo* standard of review of mixed questions of law and fact in habeas corpus proceedings. See *Wright* v. *West*, 505 U. S., at 299–303 (O'CONNOR, J., concurring in judgment).

The purpose of reviewing the entire record is, of course, to consider all the ways that error can infect the course of a trial. Although THE CHIEF JUSTICE properly quotes the phrase applied to the errors in *Kotteakos* ("'substantial and injurious effect or influence in determining the jury's verdict'"), *ante*, at 623, 627, 637, 639, we would misread *Kotteakos* itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.[2] *Kotteakos* is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," 328 U. S., at 764, and that "the judgment was not substantially swayed by the error," *id.*, at 765. In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is *not*

> "were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is

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[2] "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Id.*, at 765.

> rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." *Id.*, at 764 (citations omitted).

The *Kotteakos* standard that will now apply on collateral review is less stringent than the *Chapman* v. *California*, 386 U. S. 18 (1967), standard applied on direct review. Given the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem—a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by JUSTICE KENNEDY in *Arizona* v. *Fulminante*, 499 U. S. 279, 302, 313 (1991). While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under *Chapman*, see 499 U. S., at 312 (dissenting opinion), JUSTICE KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today, see *id.*, at 313–314 (opinion concurring in judgment). In the end, the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied.

Although our adoption of *Kotteakos* does impose a new standard in this context, it is a standard that will always require "the discrimination . . . of judgment transcending confinement by formula or precise rule. *United States* v.

Socony-Vacuum Oil Co., 310 U. S. 150, 240 [(1940)]." 328 U. S., at 761.[3] In my own judgment, for the reasons explained by THE CHIEF JUSTICE, the *Doyle* error that took place in petitioner's trial did not have a substantial and injurious effect or influence in determining the jury's verdict. Accordingly, I concur in the Court's opinion and judgment.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, and with whom JUSTICE SOUTER joins in part, dissenting.

Assuming that petitioner's conviction was in fact tainted by a constitutional violation that, while not harmless beyond a reasonable doubt, did not have "substantial and injurious effect or influence in determining the jury's verdict," *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946), it is undisputed that he would be entitled to reversal in the state courts on appeal or in this Court on certiorari review. If, however, the state courts erroneously concluded that no violation had occurred or (as is the case here) that it was harmless beyond a reasonable doubt, and supposing further that certiorari was either not sought or not granted, the majority would foreclose relief on federal habeas review. As a result of today's decision, in short, the fate of one in state custody turns on whether the state courts properly applied the Federal Constitution as then interpreted by decisions of this Court, and on whether we choose to review his claim on certiorari. Because neither the federal habeas corpus statute nor our own precedents can support such illogically disparate treatment, I dissent.

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[3] Justice Rutledge continued: "That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another." *Id.*, at 761.

I

A

Chapman v. *California*, 386 U. S. 18 (1967), established the federal nature of the harmless-error standard to be applied when constitutional rights are at stake. Such rights, we stated, are "rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.'" *Id.*, at 21 (footnote omitted). Thus,

> "[w]hether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is *every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.* With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Ibid.* (emphasis added).

Chapman, it is true, never expressly identified the source of this harmless-error standard. But, whether the standard be characterized as a "necessary rule" of federal law, *ibid.*, or criticized as a quasi-constitutional doctrine, see *id.*, at 46, 51 (Harlan, J., dissenting), the Court clearly viewed it as essential to the safeguard of federal constitutional rights. Otherwise, there would have been no justification for imposing the rule on state courts. Cf. *id.*, at 48–51 (Harlan, J., dissenting). As far as I can tell, the majority does not question *Chapman*'s vitality on direct review and, therefore, the federal and constitutional underpinnings on which it rests.

That being so, the majority's conclusion is untenable. Under *Chapman*, federal law requires reversal of a state conviction involving a constitutional violation that is not harmless beyond a reasonable doubt. A defendant whose conviction has been upheld despite the occurrence of such a violation certainly is "in custody in violation of the Constitution or laws . . . of the United States," 28 U. S. C. § 2254(a), and therefore is entitled to habeas relief. Although we have never explicitly held that this was the case, our practice before this day plainly supports this view, as the majority itself acknowledges. See, *e. g., Rose* v. *Clark,* 478 U. S. 570, 584 (1986); see also *ante,* at 630.

B

The Court justifies its decision by asserting that "collateral review is different from direct review," *ante,* at 633, and that "we have applied different standards on habeas than would be applied on direct review with respect to matters other than harmless-error analysis," *ante,* at 634. All told, however, it can only uncover a single example of a constitutional violation that would entitle a state prisoner to relief on direct, but not on collateral, review. Thus, federal habeas review is not available to a defendant claiming that the conviction rests on evidence seized in violation of the Fourth Amendment, even though such claims remain cognizable in state courts. *Stone* v. *Powell,* 428 U. S. 465 (1976). I have elsewhere stated my reasons for disagreeing with that holding, *id.,* at 536–537 (WHITE, J., dissenting), but today's decision cannot be supported even under *Stone*'s own terms.

Stone was premised on the view that the exclusionary rule is not a "personal constitutional right," *id.,* at 486, and that it "does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel," *Kimmelman* v. *Morrison,* 477 U. S. 365, 392 (1986) (Powell, J., concurring in judgment). In other words, one whose conviction rests on evidence obtained in a search or seizure that violated the Fourth Amendment is deemed not to be unconstitutionally detained. It is no surprise, then, that the Court of Appeals in this case rested its decision on an analogy between the rights guaranteed in *Doyle* v. *Ohio,* 426 U. S. 610 (1976), and those at issue in *Stone.* See 944 F. 2d 1363, 1371–1372 (CA7 1991). *Doyle,* it concluded, "is . . . a prophylactic rule designed to protect another prophylactic rule from erosion or misuse." 944 F. 2d, at 1370.

But the Court clearly and, in my view, properly rejects that view. Indeed, it repeatedly emphasizes that *Doyle* "is rooted in fundamental fairness and due process concerns," that "due process is violated whenever the prosecution uses for impeachment purposes a defendant's post-*Miranda* silence," and that it "does not bear the hallmarks of a prophylactic rule." *Ante,* at 629. Because the Court likewise leaves undisturbed the notion that *Chapman*'s harmless-error standard is required to protect constitutional rights, see *supra,* at 645, its conclusion that a *Doyle* violation that fails to meet that standard will not trigger federal habeas relief is inexplicable.

II

The majority's decision to adopt this novel approach is far from inconsequential. Under *Chapman,* the State must prove beyond a reasonable doubt that the constitutional error "did not contribute to the verdict obtained." 386 U. S., at 24. In contrast, the Court now invokes *Kotteakos* v. *United States,* 328 U. S. 750 (1946)—a case involving a nonconstitutional error of trial procedure—to impose on the defendant the burden of establishing that the error "resulted in 'actual prejudice.'" *Ante,* at 637. Moreover, although the Court of Appeals limited its holding to *Doyle* and other so-called "prophylactic" rules, 944 F. 2d, at 1375, and although the parties' arguments were similarly focused, see Brief for Respondent 36–37; Brief for United States as *Amicus Curiae* 16, 19, n. 11, the Court extends its holding to all "constitutional error[s] of the trial type," *ante,* at 638. Given that all such "trial errors" are now subject to harmless-error analysis, see *Arizona* v. *Fulminante,* 499 U. S. 279, 307–308 (1991), and that "most constitutional errors" are of this variety, *id.,* at 306, the Court effectively has ousted *Chapman* from habeas review of state convictions.* In other words, a state court determination that a constitutional error—even one as fundamental as the admission of a coerced confession, see *Fulminante, supra,* at 308—is harmless beyond a reasonable doubt has in effect become unreviewable by lower federal courts by way of habeas corpus.

I believe this result to be at odds with the role Congress has ascribed to habeas review, which is, at least in part, to deter both prosecutors and courts from disregarding their constitutional responsibilities. "[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Desist* v. *United States,* 394 U. S. 244, 262–263 (1969) (Harlan, J., dissenting); see also *Teague* v. *Lane,* 489 U. S. 288, 306 (1989) (plurality opinion). In response, the majority characterizes review of the *Chapman* determination by a federal habeas court as "scarcely . . . logical," *ante,* at 636, and, in any event, sees no evidence that deterrence is needed. *Ibid.* Yet the logic of such practice is not ours to assess for, as Justice Frankfurter explained:

> "Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. . . . But the wisdom of such a modification in the law is for Congress to consider . . . ." *Brown* v.

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*As I explained in *Fulminante,* I have serious doubt regarding the effort to classify in systematic fashion constitutional violations as either "trial errors"—that are subject to harmlessness analysis—or "structural defects"—that are not. See 499 U. S., at 290 (WHITE, J., dissenting).

> *Allen*, 344 U. S. 443, 499–500 (1953) (opinion of Frankfurter, J.).
>
> "[T]he prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress . . . provided it should not have." *Id.*, at 500.

See also *Reed* v. *Ross*, 468 U. S. 1, 10 (1984). As for the "empirical evidence" the majority apparently seeks, I cannot understand its import. Either state courts are faithful to federal law, in which case there is no cost in applying the *Chapman* as opposed to the *Kotteakos* standard on collateral review; or they are not, and it is precisely the role of habeas corpus to rectify that situation.

Ultimately, the central question is whether States may detain someone whose conviction was tarnished by a constitutional violation that is not harmless beyond a reasonable doubt. *Chapman* dictates that they may not; the majority suggests that, so long as direct review has not corrected this error in time, they may. If state courts remain obliged to apply *Chapman*, and in light of the infrequency with which we grant certiorari, I fail to see how this decision can be reconciled with Congress' intent.

III

Our habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review. I believe this picture bears scant resemblance either to Congress' design or to our own precedents. The Court of Appeals having yet to apply *Chapman* to the facts of this case, I would remand to that court for determination of whether the *Doyle* violation was harmless beyond a reasonable doubt. I dissent.

JUSTICE BLACKMUN, dissenting.

I agree that "today's decision cannot be supported even under *Stone*'s own terms," *ante,* at 646 (WHITE, J., dissenting). Therefore, I join JUSTICE WHITE's dissent in its entirety.

JUSTICE O'CONNOR, dissenting.

I have no dispute with the Court's observation that "collateral review is different from direct review." *Ante,* at 633. Just as the federal courts may decline to adjudicate certain issues of federal law on habeas because of prudential concerns, see *Withrow* v. *Williams, post,* at 686; *post,* at 699–700 (O'CONNOR, J., concurring in part and dissenting in part), so too may they resolve specific claims on habeas using different and more lenient standards than those applicable on direct review, see, *e. g., Teague* v. *Lane,* 489 U. S. 288, 299–310 (1989) (habeas claims adjudicated under the law prevailing at time conviction became final and not on the basis of intervening changes of law). But decisions concerning the Great Writ "warrant restraint," *Withrow, post,* at 700 (O'CONNOR, J., concurring in part and dissenting in part), for we ought not take lightly alteration of that "'fundamental safeguard against unlawful custody,'" *post,* at 697–698 (quoting *Fay* v. *Noia,* 372 U. S. 391, 449 (1963) (Harlan, J., dissenting)).

In my view, restraint should control our decision today. The issue before us is not whether we should remove from the cognizance of the federal courts on habeas a discrete prophylactic rule unrelated to the truthfinding function of trial, as was the case in *Stone* v. *Powell,* 428 U. S. 465 (1976), and more recently in *Withrow* v. *Williams, post,* p. 680. Rather, we are asked to alter a standard that not only finds application in virtually every case of error but that also may be critical to our faith in the reliability of the criminal process. Because I am not convinced that the principles governing the exercise of our habeas powers—federalism, finality, and fairness—counsel against applying *Chapman*'s harmless-error standard on collateral review, I would adhere to our former practice of applying it to cases on habeas and direct review alike. See *ante,* at 630. I therefore respectfully dissent.

The Court begins its analysis with the nature of the constitutional violation asserted, *ante,* at 628–630, and appropriately so. We long have recognized that the exercise of the federal courts' habeas powers is governed by equitable principles. *Fay* v. *Noia, supra,* at 438; *Withrow, post,* at 699–700 (O'CONNOR, J., concurring in part and dissenting in part). And the nature of the right at issue is an important equitable consideration. When a prisoner asserts the violation of a core constitutional privilege critical to the reliability of the criminal process, he has a strong claim that fairness favors review; but if the infringement concerns only a prophylactic rule, divorced from the criminal trial's truthfinding function, the prisoner's claim to the equities rests on far shakier ground. Thus, in *Withrow* v. *Williams,* this Court declined to bar relitigation of *Miranda* claims on habeas because *Miranda* is connected to the Fifth Amendment and the Fifth Amendment, in turn, serves the interests of reliability. *Withrow, post,* at 691–692. I dissented because I believe that *Miranda* is a prophylactic rule that actually impedes the truthseeking function of criminal trials. *Withrow, post,* at 700, 701–708. See also *Stone* v. *Powell, supra,* at 486, 490 (precluding review of exclusionary rule violations in part because the rule is judicially fashioned and interferes with the truthfinding function of trial).

Petitioner in this case alleged a violation of *Doyle* v. *Ohio,* 426 U. S. 610 (1976), an error the Court accurately characterizes as constitutional trial error. *Ante,* at 629–630. But the Court's holding today, it turns out, has nothing to do with *Doyle* error at all. Instead, the Court announces that the harmless-error standard of *Chapman* v. *California,* 386 U. S. 18, 24 (1967), which requires the prosecution to prove constitutional error harmless beyond a reasonable doubt, no longer applies to *any* trial error asserted on habeas, whether it is a

Doyle error or not. In *Chapman's* place, the Court substitutes the less rigorous standard of *Kotteakos* v. *United States,* 328 U. S. 750, 776 (1946). *Ante,* at 638.

A repudiation of the application of *Chapman* to *all* trial errors asserted on habeas should be justified, if at all, based on the nature of the *Chapman* rule itself. Yet, as JUSTICE WHITE observes, *ante,* at 645 (dissenting opinion), one searches the majority opinion in vain for a discussion of the basis for *Chapman's* harmless-error standard. We are left to speculate whether *Chapman* is the product of constitutional command or a judicial construct that may overprotect constitutional rights. More important, the majority entirely fails to discuss the *effect* of the *Chapman* rule. If there is a unifying theme to this Court's habeas jurisprudence, it is that the ultimate equity on the prisoner's side—the possibility that an error may have caused the conviction of an actually innocent person—is sufficient by itself to permit plenary review of the prisoner's federal claim. *Withrow, post,* at 700 (O'CONNOR, J., concurring in part and dissenting in part) (citing cases). Whatever the source of the *Chapman* standard, the equities may favor its application on habeas if it substantially promotes the central goal of the criminal justice system—accurate determinations of guilt and innocence. See *Withrow, post,* at 705–706 (reasoning that, although *Miranda* may be a prophylactic rule, the fact that it is not "divorced" from the truthfinding function of trial weighs in favor of its application on habeas); *Teague, supra,* at 313 (if absence of procedure seriously diminishes likelihood of accurate conviction, new rule requiring such procedure may be retroactively applied on habeas).

In my view, the harmless-error standard often will be inextricably intertwined with the interest of reliability. By now it goes without saying that harmless-error review is of almost universal application; there are few errors that may not be forgiven as harmless. *Arizona* v. *Fulminante,* 499 U. S. 279, 306–307 (1991). For example, we have recognized that a defendant's right to confront the witnesses against him is central to the truthfinding function of the criminal trial. See, *e. g.*, *Maryland* v. *Craig*, 497 U. S. 836, 845–847 (1990); *Ohio* v. *Roberts*, 448 U. S. 56, 65 (1980); *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895); see also 3 W. Blackstone, Commentaries 373–374 (1768). But Confrontation Clause violations are subject to harmless-error review nonetheless. See *Coy* v. *Iowa*, 487 U. S. 1012, 1021–1022 (1988). When such an error is detected, the harmless-error standard is crucial to our faith in the accuracy of the outcome: The absence of full adversary testing, for example, cannot help but erode our confidence in a verdict; a jury easily may be misled by such an omission. Proof of harmlessness beyond a reasonable doubt, however, sufficiently restores confidence in the verdict's reliability that the conviction may stand despite the potentially accuracy impairing error. Such proof demonstrates that, even though the error had the *potential* to induce the jury to err, in fact there is no reasonable possibility that it did. Rather, we are confident beyond a reasonable doubt that the error had no influence on the jury's judgment at all. Cf. *In re Winship*, 397 U. S. 358, 363–364 (1970) (proof of guilt beyond a reasonable doubt indispensable to community's respect and confidence in criminal process).

At least where errors bearing on accuracy are at issue, I am not persuaded that the *Kotteakos* standard offers an adequate assurance of reliability. Under the Court's holding today, federal courts on habeas are barred from offering relief unless the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Ante*, at 637 (quoting *Kotteakos*, *supra*, at 776). By tolerating a greater probability that an error with the potential to undermine verdict accuracy was harmful, the Court increases the likelihood that a conviction will be preserved despite an error that actually affected the reliability of the trial. Of course, the Constitution does not require that every conceivable precaution in favor of reliability be taken; and certainly 28 U. S. C. § 2254 does not impose such an obligation on its own. Indeed, I agree with the Court that habeas relief under § 2254 is reserved for those prisoners "whom society has 'grievously wronged.'" *Ante*, at 637. But prisoners who may have been convicted mistakenly because of constitutional trial error *have* suffered a grievous wrong and ought not be required to bear the greater risk of uncertainty the Court now imposes upon them. Instead, where constitutional error may have affected the accuracy of the verdict, on habeas we should insist on such proof as will restore our faith in the verdict's accuracy to a reasonable certainty. Adherence to the standard enunciated in *Chapman* requires no more; and the equities require no less.

To be sure, the harmless-error inquiry will not always bear on reliability. If the trial error being reviewed for harmlessness is not itself related to the interest of accuracy, neither is the harmless-error standard. Accordingly, in theory it would be neither illogical nor grudging to reserve *Chapman* for errors related to the accuracy of the verdict, applying *Kotteakos'* more lenient rule whenever the error is of a type that does not impair confidence in the trial's result. But the Court draws no such distinction. On the contrary, it holds *Kotteakos* applicable to *all* trial errors, whether related to reliability or not. The Court does offer a glimmer of hope by reserving in a footnote the possibility of an exception: *Chapman* may remain applicable, it suggests, in some "unusual" cases. But the Court's description of those cases suggests that its potential exception would be both exceedingly narrow and unrelated to reliability concerns. See *ante*, at 638, n. 9 (reserving the "possibility that in an unusual case, a deliberate and especially egregious error of the trial type" or error "combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even it did not substantially influence the jury's verdict").

But even if the Court's holding were limited to errors divorced from reliability concerns, the decision nevertheless would be unwise from the standpoint of judicial administration. Like JUSTICE WHITE, I do not believe we should turn our habeas jurisprudence into a "patchwork" of rules and exceptions without strong justification. *Ante*, at 649 (dissenting opinion). The interest of efficiency, always relevant to the scope of habeas relief, see, *e. g., Stone*, 428 U. S., at 491, n. 31; *Withrow, post*, at 693–694; *post*, at 708–713 (O'CONNOR, J., concurring in part and dissenting in part), favors simplification of legal inquiries, not their multiplication. A rule requiring the courts to distinguish between errors that affect accuracy and those that do not, however, would open up a whole new frontier for litigation and decision. In each case, the litigants would brief and federal judges would be required to decide whether the particular error asserted relates to accuracy. Given the number of constitutional rules we have recognized and the virtually limitless ways in which they might be transgressed, I cannot imagine that the benefits brought by such litigation could outweigh the costs it would impose.

In fact, even on its own terms the Court's decision buys the federal courts a lot of trouble. From here on out, prisoners undoubtedly will litigate—and judges will be forced to decide—whether each error somehow might be wedged into the narrow potential exception the Court mentions in a footnote today. Moreover, since the Court only mentions the *possibility* of an exception, all concerned must also address whether the exception exists at all. I see little justification for imposing these novel and potentially difficult questions on our already overburdened justice system.

Nor does the majority demonstrate that the *Kotteakos* standard will ease the burden of conducting harmless-error review in those cases to which it does apply. Indeed, as JUSTICE STEVENS demonstrates in his concurrence, *Kotteakos* is unlikely to lighten the load of the federal judiciary at all. The courts still must review the entire record in search of conceivable ways the error may have influenced the jury; they still must conduct their review *de novo;* and they still must decide whether they have sufficient confidence that the verdict would have remained unchanged even if the error had not occurred. See *ante,* at 641–642. The only thing the Court alters today is the degree of confidence that suffices. But *Kotteakos'* threshold is no more precise than *Chapman's*; each requires an exercise of judicial judgment that cannot be captured by the naked words of verbal formulae. *Kotteakos,* it is true, is somewhat more lenient; it will permit more errors to pass uncorrected. But that simply reduces the number of cases in which relief will be granted. It does not decrease the burden of identifying those cases that warrant relief.

Finally, the majority considers the costs of habeas review generally. *Ante,* at 637. Once again, I agree that those costs—the effect on finality, the infringement on state sovereignty, and the social cost of requiring retrial, sometimes years after trial and at a time when a new trial has become difficult or impossible—are appropriate considerations. See *Withrow, post,* at 703–704 (O'CONNOR, J., concurring in part and dissenting in part); see also *post,* at 686–687, 708–709; *Stone, supra,* at 489–491. But the Court does not explain how those costs set the harmless-error inquiry apart from any other question presented on habeas; such costs are inevitable *whenever* relief is awarded. Unless we are to accept the proposition that denying relief whenever possible is an unalloyed good, the costs the Court identifies cannot by themselves justify the lowering of standards announced today. The majority, of course, does not contend otherwise; instead, it adheres to our traditional approach of distinguishing between those claims that are worthy of habeas relief and those that, for prudential and equitable reasons, are not. Nonetheless, it seems to me that the Court's decision cuts too broadly and deeply to comport with the equitable and remedial nature of the habeas writ; it is neither justified nor justifiable from the standpoint of fairness or judicial efficiency. Because I would remand the case to the Court of Appeals for application of *Chapman's* more demanding harmless-error standard, I respectfully dissent.

JUSTICE SOUTER, dissenting.

I join in all but the footnote and Part III of JUSTICE WHITE's dissent, subject only to the caveat that I do not mean to indicate an opinion on the merits of *Stone* v. *Powell,* 428 U. S. 465 (1976).

CSX TRANSPORTATION, INC. *v.* EASTERWOOD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91–790. Argued January 12, 1993—Decided April 21, 1993*

After her husband was killed when a train owned and operated by CSX Transportation, Inc., collided with his truck at a Georgia crossing, Lizzie Easterwood brought this diversity wrongful-death action, alleging, *inter alia,* that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. The District Court granted summary judgment for CSX on the ground that both claims were pre-empted under the Federal Railroad Safety Act of 1970 (FRSA). The Court of Appeals affirmed in part and reversed in part, holding that the allegation based on the train's speed was pre-empted but that the claim based on the absence of proper warning devices was not.

Held: Under the FRSA, federal regulations adopted by the Secretary of Transportation pre-empt Easterwood's negligence action only insofar as it asserts that CSX's train was traveling at an excessive speed. Pp. 661–676.

(a) The FRSA permits the States to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a . . . regulation . . . covering the subject matter of such State requirement," and, even thereafter, to adopt safety standards more stringent than the federal requirements "when necessary to eliminate or reduce an essentially local safety hazard," if those standards are compatible with federal law and do not unduly burden interstate commerce. 45 U. S. C. § 434. Legal duties imposed on railroads by a State's common law of negligence fall within the scope of § 434's broad phrases describing matters "relating to railroad safety." The section's term "covering" indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law. Pp. 661–665.

(b) The Secretary's grade crossing safety regulations do not "cove[r] the subject matter" of Easterwood's warning devices claim. In light of the relatively stringent standard set by § 434's language and the pre-

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*Together with No. 91–1206, *Easterwood* v. *CSX Transportation, Inc.*, also on certiorari to the same court.

sumption against pre-emption, the regulations of 23 CFR pt. 924 cannot be said to support pre-emption. They merely establish the general terms under which States may use federal aid to eliminate highway hazards, including those at grade crossings, and provide no explicit indication of their effect on negligence law, which often has assigned joint responsibility for maintaining safe crossings to railroads and States. Likewise, pre-emption is not established by 23 CFR § 646.214(b)(1)'s requirement that the States comply with the Manual on Uniform Traffic Control Devices for Streets and Highways (Manual) and by that Manual's declaration that the States determine the need for, and type of, safety devices to be installed at a grade crossing. It is implausible that established state negligence law would be implicitly displaced by an elliptical reference in a Government Manual otherwise devoted to describing for the benefit of state employees the proper size, color, and shape of traffic signs and signals. Moreover, the Manual itself disavows any claim to cover the subject matter of the tort law of grade crossings. Finally, although 23 CFR §§ 646.214(b)(3) and (4) do displace state decisionmaking authority by requiring particular warning devices at grade crossings for certain federally funded projects, those regulations are inapplicable here because a plan to install such devices at the crossing at issue was shelved and the federal funds allocated for the project diverted elsewhere. Pp. 665–673.

(c) Easterwood's excessive speed claim cannot stand in light of the Secretary's adoption of the regulations in 49 CFR § 213.9(a). Although, on their face, § 213.9(a)'s provisions address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate, the overall structure of the Secretary's regulations demonstrates that these speed limits were adopted with safety concerns in mind and should be understood as "covering the subject matter" in question. It is irrelevant that the Secretary's primary purpose in enacting the speed limits may have been to prevent derailments, since § 434 does not call for an inquiry into purpose. Moreover, because the common-law speed restrictions relied on by Easterwood are concerned with local hazards only in the sense that their application depends on each case's facts, those restrictions are not preserved by § 434's second saving clause. Pp. 673–675.

933 F. 2d 1548, affirmed.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III and IV, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SOUTER, J., joined, *post,* p. 676.

Howard J. Trienens argued the cause for petitioner in No. 91–790 and respondent in No. 91–1206. With him on the briefs were *Carter G. Phillips, Mark E. Haddad, Jack H. Senterfitt,* and *Richard T. Fulton.*

Tambra Pannell Colston argued the cause *pro hac vice* for respondent in No. 91–790 and petitioner in No. 91–1206. With her on the brief were *James I. Parker* and *William L. Lundy.*

Deputy Solicitor General Mahoney argued the cause for the United States urging affirmance in both cases. With her on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, William Kanter, Paul M. Geier,* and *Dale C. Andrews.*†

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†Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Lee Fisher,* Attorney General of Ohio, and *Nancy J. Miller,* Deputy Chief Counsel, and by the Attorneys General for their respective jurisdictions as follows: *Winston Bryant* of Arkansas, *Richard Blumenthal* of Connecticut, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Ronald W. Burris* of Illinois, *Bonnie J. Campbell* of Iowa, *Scott Harshbarger* of Massachusetts, *Hubert H. Humphrey III* of Minnesota, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of Nevada, *Tom Udall* of New Mexico, *Ernest D. Preate, Jr.,* of Pennsylvania, *Dan Morales* of Texas, and *Joseph B. Meyer* of Wyoming; for the American Automobile Association by *Paul R. Verkuil;* for the Railway Labor Executives' Association by *Lawrence M. Mann;* and for Cynthia Wilson Pryor by *J. N. Raines.*

Briefs of *amici curiae* were filed for the Association of American Railroads by *John H. Broadley, Donald B. Verrilli, Jr., John B. Morris, Jr.,* and *Robert W. Blanchette;* for the Association of Trial Lawyers of America et al. by *Dale Haralson, Roxanne Barton Conlin, Jeffrey Robert White,* and *Arthur H. Bryant;* for the American Trucking Associations, Inc., et al. by *Daniel R. Barney, David A. Strauss, Richard A. Allen,* and *Charles A. Webb;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *Scott L. Nelson;* for the National Railroad Passenger Corp. by *Paul F. Mickey, Jr., Alvin Dunn,* and *Stephen C. Rogers;* and for the Texas Class I Railroads et al. by *Paul A. Cunningham, Gerald P. Norton, Carolyn F. Corwin,* and *Robert Brian Burns, Jr.*

JUSTICE WHITE delivered the opinion of the Court.

Thomas Easterwood was killed on February 24, 1988 when a train owned and operated by petitioner and cross-respondent CSX Transportation, Inc., collided with the truck he was driving at the Cook Street crossing in Cartersville, Georgia. His widow, respondent and cross-petitioner Lizzie Easterwood, brought this diversity wrongful-death action, which alleges, *inter alia*, that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. The issue before the Court is the extent to which the Federal Railroad Safety Act of 1970 (FRSA), 84 Stat. 971, as amended, 45 U. S. C. §§421–447 (1988 ed. and Supp. II), pre-empts these claims.

The District Court for the Northern District of Georgia granted summary judgment for CSX on the ground that both claims were pre-empted. 742 F. Supp. 676, 678 (1990). The Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part, holding that respondent's allegation of negligence based on the train's speed was pre-empted, but that the claim based on the absence of proper warning devices was not. 933 F. 2d 1548, 1553–1556 (1991). Because Courts of Appeals have differed over the pre-emptive effect of FRSA on negligence suits against railroads, we granted the petitions of both parties. 505 U. S. 1217 (1992).[1] We now affirm.

I

FRSA was enacted in 1970 "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons . . . ." 45 U. S. C. §421. To aid in the achievement of these goals, the Act specifically directs the Secretary of Transportation to study and develop solutions to safety problems posed by grade crossings. § 433. In addition, the Secretary is given broad powers to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . . ." § 431(a). The pre-emptive effect of these regulations is governed by § 434, which contains express saving and pre-emption clauses.[2] Thus, the States are permitted to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." Even after federal standards have been promulgated, the States may adopt more stringent safety requirements "when necessary to eliminate or reduce an essentially local safety hazard," if those standards are "not incompatible with" federal laws or regulations and not an undue burden on interstate commerce.

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[1] See *Karl* v. *Burlington Northern R. Co.*, 880 F. 2d 68, 75–76 (CA8 1989); *Marshall* v. *Burlington Northern, Inc.*, 720 F. 2d 1149, 1154 (CA9 1983); *Hatfield* v. *Burlington Northern R. Co.*, 958 F. 2d 320, 321 (CA10 1992).

In 1971, the Secretary, acting through the Federal Railroad Administration (FRA), promulgated regulations under FRSA setting maximum train speeds for different classes of track. See 49 CFR § 213.9 (1992). Also in 1971, and again in 1972, the Secretary duly reported to Congress on the problem of grade crossings and on possible solutions.[3] Congress responded by enacting the Highway Safety Act of 1973, Title II of the Act of Aug. 13, 1973, 87 Stat. 282, as amended, note following 23 U. S. C. § 130. This Act makes federal funds available to the States to improve grade crossings, in return for which the States must "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U. S. C. § 130(d). Further conditions on the States' use of federal aid to improve grade crossings have been set out in regulations promulgated by the Secretary through the Federal Highway Administration (FHWA) under FRSA and the Highway Safety Act. See 23 CFR pts. 646, 655, 924, 1204 (1992). It is petitioner's contention that the Secretary's speed and grade crossing regulations "cove[r] the subject matter" of, and therefore pre-empt, the state law on which respondent relies.[4]

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[2] The section reads:

"§ 434. National uniformity of laws, rules, regulations, orders, and standards relating to railroad safety; State regulation

"The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce."

Where a state statute conflicts with, or frustrates, federal law, the former must give way. U. S. Const., Art. VI, cl. 2; *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981). In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not lie unless it is "the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue. *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983). If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

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[3] See U. S. Dept. of Transportation, Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem (1971); U. S. Dept. of Transportation, Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem (1972).

[4] The Court of Appeals found that, because the grade crossing regulations were promulgated pursuant to the Highway Safety Act (rather than FRSA), their pre-emptive effect is not governed by § 434. 933 F. 2d 1548, 1555 (CA11 1991). As petitioner notes, this distinction does not apply to 23 CFR pts. 646 and 1204, which were promulgated under the authority of both statutes. See Brief for Petitioner in No. 91–790, p. 36. In any event, the plain terms of § 434 do not limit the application of its express pre-emption clause to regulations adopted by the Secretary pursuant to FRSA. Instead, they state that any regulation "adopted" by the Secretary may have pre-emptive effect, regardless of the enabling legislation. At the very least, the Court of Appeals' conclusion is inappropriate with respect to regulations issued under 23 U. S. C. § 130, given that the latter is a direct outgrowth of FRSA.

According to § 434, applicable federal regulations may pre-empt any state "law, rule, regulation, order, or standard relating to railroad safety." Legal duties imposed on railroads by the common law fall within the scope of these broad phrases. Cf. *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 522 (1992) (federal statute barring additional " 'requirement[s]' . . . 'imposed under State law' " pre-empts common-law claims); *id.*, at 548–549 (SCALIA, J., concurring in judgment in part and dissenting in part) (same). Thus, the issue before the Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as Georgia negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings. To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter, cf. *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 383–384 (1992) (statute's use of "relating to" confers broad pre-emptive effect), for "covering" is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law. See Webster's Third New International Dictionary 524 (1961) (in the phrase "policy clauses covering the situation," cover means "to com-prise, include, or embrace in an effective scope of treatment or operation"). The term "covering" is in turn employed within a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses. See *supra*, at 662.

II

After filing an answer denying the allegations of negligence with respect to the warning devices at Cook Street and with respect to the train's speed, petitioner moved for summary judgment on the ground that these claims were pre-empted. As the litigation comes to us, petitioner does not assert that the complaint fails to state a claim under Georgia law. The sole issue here is pre-emption, which depends on whether the regulations issued by the Secretary cover the subject matter of the two allegations, each of which we may assume states a valid cause of action.[5]

As indicated above, the Secretary of Transportation has addressed grade crossing safety through a series of regulations. Each State receiving federal aid is required to establish a "highway safety improvement program" that establishes priorities for addressing all manner of highway hazards and guides the implementation and evaluation of remedial measures. 23 CFR pt. 924 (1992).[6] In setting priorities, the States are directed to consider and rank the dangers posed by grade crossings. § 924.9(a)(4). Having developed a program, each State must evaluate its effectiveness and costs, § 924.13, and file yearly reports with the FHWA, § 924.15.

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[5] Because the litigation comes to us in this posture, neither party provides a description of Georgia statute or case law dealing with train speeds or the duties of railroads with respect to grade crossings. However, we note that Georgia Code Ann. §32-6-190 (1991) provides that railroads are under a duty to maintain their grade crossings "in such condition as to permit the safe and convenient passage of public traffic." While final authority for the installation of particular safety devices at grade crossings has long rested with state and local governments, see, *e. g.*, §40-6-25, this allocation of authority apparently does not relieve the railroads of their duty to take all reasonable precautions to maintain grade crossing safety, *Southern R. Co.* v. *Georgia Kraft Co.*, 188 Ga. App. 623, 624, 373 S. E. 2d 774, 776 (1988), including, for example, identifying and bringing to the attention of the relevant authorities dangers posed by particular crossings.

States are subject to further regulations governing the use of particular warning devices. For all projects, they must employ devices that conform to standards set out in FHWA's Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD or Manual).[7] §§ 646.214(b)(1), 655.603. In addition, for projects that involve grade crossings "located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of [an] existing roadway," see § 646.214(b)(2), or in which "Federal-aid funds participate in the installation of the [warning] devices," regulations specify warning devices that must be installed. See §§ 646.214(b)(3) and (4). Thus, States must employ automatic gates with flashing light signals as part of any improvement project that concerns a crossing that features, *inter alia,* multiple tracks, high speed trains operating in areas of limited visibility, heavy vehicle or train traffic, or if a diagnostic team made up of "representatives of the parties of interest in [the crossing]," § 646.204(g), recommends them.[8] For federally funded installations at cross-

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[6] Parallel provisions require state programs to systematically identify hazardous crossings and to develop "a program for the elimination of hazards." 23 CFR § 1204.4 (1992), Highway Safety Program Guideline No. 12(G).

[7] U. S. Dept. of Transportation, Federal Highway Administration, Manual on Uniform Traffic Control Devices for Streets and Highways (1988). The Manual has been incorporated into federal regulations promulgated by the Secretary. See 23 CFR §§ 655.601–655.603 (1992).

[8] 23 CFR § 646.214(b)(3) reads:

"(3)(i) *Adequate warning devices* under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are ings that do not present the track conditions specified in §646.214(b)(3), "the type of warning device to be installed, whether the determination is made by a State . . . agency, and/or the railroad, is subject to the approval of the FHWA." §646.214(b)(4).

The regulations of 23 CFR pt. 924 do not of themselves support petitioner's claim of pre-emption. These provisions establish the general terms of the bargain between the Federal and State Governments: The States may obtain federal funds if they take certain steps to ensure that the funds are efficiently spent. On its face, this federal effort to encourage the States to rationalize their decisionmaking has little to say about the subject matter of negligence law, because, with respect to grade crossing safety, the responsibilities of railroads and the State are, and traditionally have been, quite distinct. Before the enactment of FRSA, for example, Georgia's authority over grade crossing improvements did not excuse a railroad's liability in negligence for failing to maintain a safe crossing, see n. 5, *supra,* just as a jury finding

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to include automatic gates with flashing light signals when one or more of the following conditions exist:

"(A) Multiple main line railroad tracks.

"(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

"(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

"(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

"(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

"(F) A diagnostic team recommends them.

"(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable."

For the definition of "diagnostic team," see 23 CFR §646.204(g) (1992).

of railroad negligence bore no particular significance on the State's safety efforts beyond that which the State wished to give it. Certainly there is no explicit indication in the regulations of 23 CFR pt. 924 that the terms of the Federal Government's bargain with the States require modification of this regime of separate spheres of responsibility. And, contrary to the view of the Court of Appeals for the Tenth Circuit, it does not necessarily follow that "[t]he hit-or-miss common law method runs counter to a statutory scheme of planned prioritization." *Hatfield* v. *Burlington Northern R. Co.,* 958 F. 2d 320, 324 (1992). In fact, the scheme of negligence liability could just as easily complement these regulations by encouraging railroads—the entities arguably most familiar with crossing conditions—to provide current and complete information to the state agency responsible for determining priorities for improvement projects in accordance with § 924.9. In light of the relatively stringent standard set by the language of § 434 and the presumption against preemption, and given that the regulations provide no affirmative indication of their effect on negligence law, we are not prepared to find pre-emption solely on the strength of the general mandates of 23 CFR pt. 924.

Likewise, the requirement that the States comply with the MUTCD does not cover the subject matter of the tort law of grade crossings. Petitioner's contrary reading rests primarily on language that appears in Part VIII of the Manual, entitled "Traffic Control Systems for Railroad-Highway Grade Crossings":

> "[T]he highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installa-

> tion and operation shall be in accordance with the national standards contained herein." Manual, at 8A–1.[9]

According to petitioner, the third sentence of this paragraph, combined with the directive in 23 CFR § 646.214(b)(1) that the States comply with the Manual, amounts to a determination by the Secretary that state governmental bodies shall bear exclusive responsibility for grade crossing safety.

Petitioner's argument suffers from an initial implausibility: It asserts that established state negligence law has been implicitly displaced by means of an elliptical reference in a Government Manual otherwise devoted to describing for the benefit of state employees the proper size, color, and shape of traffic signs and signals. Not surprisingly, the Manual itself disavows any such pretensions: "It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation." Manual, at 1A–4. The language on which petitioner relies undermines rather than supports its claim by acknowledging that the States must approve the installation of any protective device even as the railroads maintain "joint responsibility" for traffic safety at crossings. As is made clear in the FHWA's guide to the Manual, the MUTCD provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between the Federal and State Governments and between States and railroads:

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[9] Petitioner also notes similar language contained in the Manual, at 8D–1:

"The selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations.

. . . . .

". . . Before a new or modified grade crossing traffic control system is installed, approval is required from the appropriate agency within a given State."

> "8A–6 Grade-Crossing Responsibility
>
> "Jurisdiction
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> "Jurisdiction over railroad-highway crossings resides almost exclusively in the States. Within some States, responsibility is frequently divided among several public agencies and the railroad." U. S. Dept. of Transportation, Federal Highway Administration, Traffic Control Devices Handbook (1983).

Rather than establishing an alternative scheme of duties incompatible with existing Georgia negligence law, the Manual disavows any claim to cover the subject matter of that body of law.

The remaining potential sources of pre-emption are the provisions of 23 CFR §§646.214(b)(3) and (4), which, unlike the foregoing provisions, do establish requirements as to the installation of particular warning devices. Examination of these regulations demonstrates that, when they are applicable, state tort law is pre-empted. However, petitioner has failed to establish that the regulations apply to these cases, and hence we find respondent's grade crossing claim is not pre-empted.

As discussed *supra*, at 666–667, under §§646.214(b)(3) and (4), a project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds "participate in the installation of the [warning] devices."[10] Thus, unlike the Manual, §§646.214(b)(3) and (4) displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. Indeed, §§646.214(b)(3) and (4) effectively set the terms under which railroads are to participate in the improvement of crossings. The former section envisions railroad involvement in the selection of warning devices through their participation in diagnostic teams which may recommend the use or nonuse of crossing gates. §§ 646.214(b)(3)(i)(F) and (3)(ii). Likewise, § 646.214(b)(4), which covers federally funded installations at crossings that do not feature multiple tracks, heavy traffic, or the like, explicitly notes that railroad participation in the initial determination of "the type of warning device to be installed" at particular crossings is subject to the Secretary's approval. In either case, the Secretary has determined that the railroads shall not be made to pay any portion of installation costs. § 646.210(b)(1). In short, for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

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[10] As petitioner has not suggested that the Cook Street crossing is located in, or near the terminus of, a federal-aid highway project, the issue of the proper application of 23 CFR §646.214(b)(2) (1992) is not before us.

The remaining question with respect to respondent's grade crossing claim is whether the preconditions for the application of either regulation have been met. A review of the record reveals that they have not. Petitioner relies on an affidavit from an engineer for the Georgia Department of Transportation (DOT) which was submitted in support of its motion for summary judgment. The affidavit indicates that, in 1979–1980, the DOT decided to install a crossing gate at the West Avenue crossing in Cartersville. That gate could not be installed, however, without placing motion-detection devices at four adjacent crossings, including Cook Street. App. 16. The DOT therefore installed new circuitry at each crossing, and subsequently installed gates at West Avenue and each of the adjacent crossings except Cook Street. Although a gate was also planned for Cook Street and funds set aside for the project, no other devices were installed because the street's width required the construction of a traffic island, which in turn required city approval. When the city declined to approve the island out of concern for the flow of vehicular traffic, the plan for the gate was shelved and the funds allocated for use in another project.

These facts do not establish that federal funds "participate[d] in the installation of the [warning] devices" at Cook Street. The only equipment installed was the motion-detection circuitry. Such circuitry does not meet the definition of warning devices provided in 23 CFR §§ 646.204(i) and (j) (1992).[11] Petitioner nevertheless contends that the Cook Street crossing was part of a single project to improve the five Cartersville crossings, and that the regulations were applicable because federal funds participated in the installation of gates at the other four crossings. Reply Brief for Petitioner in No. 91–790, p. 20. Neither party identifies any statutory or regulatory provisions defining the term "project," although some usages cast doubt on petitioner's view. See, *e. g.*, 23 CFR § 646.210(c)(3) (describing the elimination of "a grade crossing" as "the . . . project"). Even if the term could be construed to include either individual or multiple crossing projects, it is clear that the Georgia DOT treated the installation of warning devices at West Avenue and Cook Street as distinct projects. Respondent's own affiant states that the cost of the motion detector installed at Cook Street "was included in the estimated costs proposal prepared . . . for the West Avenue crossing improvements . . . ." App. 17.

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[11] The relevant definitions state:

"(i) *Passive warning devices* means those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings *to indicate the presence of a crossing* but which do not change aspect upon the approach or presence of a train.

"(j) *Active warning devices* means those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar devices, as well as manually operated devices and crossing watchmen, *all of which display to motorists positive warning of the approach or presence of a train.*" 23 CFR §§ 646.204(i) and (j) (emphases added).

Moreover, as found by the District Court, when Cartersville scotched the plans for the Cook Street gate, "the funds earmarked for this crossing were . . . transferred to other projects. The decision to install gate arms at the Cook Street crossing was placed on a list of projects to be considered at a later time." 742 F. Supp., at 678. In light of the inapplicability of §§646.214(b)(3) and (4) to these cases, we conclude that respondent's grade crossing claim is not pre-empted.[12]

III

Federal regulations issued by the Secretary pursuant to FRSA and codified at 49 CFR §213.9(a) (1992) set maximum allowable operating speeds for all freight and passenger trains for each class of track on which they travel. The different classes of track are in turn defined by, *inter alia*, their gage, alinement, curvature, surface uniformity, and the number of crossties per length of track. See §§213.51–213.143. The track at the Cook Street crossing is class four, for which the maximum speed is 60 miles per hour. Although respondent concedes that petitioner's train was traveling at less than 60 miles per hour,[13] she nevertheless contends that petitioner breached its common-law duty to operate its train at a moderate and safe rate of speed. See, *e. g., Central of Georgia R. Co.* v. *Markert*, 200 Ga. App. 851, 852; 410 S. E. 2d 437, 438, cert. denied, 200 Ga. App. 895 (1991). Petitioner contends that this claim is pre-empted because the federal speed limits are regulations covering the subject matter of the common law of train speed.

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[12] We reject petitioner's claim of implied "conflict" pre-emption, Brief for Petitioner in No. 91–790, pp. 40–43, on the basis of the preceding analysis. Of course we express no opinion on how the state-law suit against the railroad should come out in light of the decisions taken by Cartersville and the Georgia DOT with respect to the Cook Street project.

[13] Affidavits submitted by the parties indicate that the train was moving at a rate of 32 to 50 miles per hour.

On their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation of the sort that respondent seeks to impose on petitioner.

Because the conduct of the automobile driver is the major variable in grade crossing accidents, and because trains offer far fewer opportunities for regulatory control, the safety regulations established by the Secretary concentrate on providing clear and accurate warnings of the approach of oncoming trains to drivers.[14] Accordingly, the Secretary's regulations focus on providing appropriate warnings given variations in train speed. The MUTCD, for example, requires the installation at grade crossings of signaling devices that provide uniform periods of advance notice regardless of train speed. Manual, at 8C–7. Likewise, as discussed *supra,* at 666, automatic gates are required for federally funded projects affecting crossings over which trains travel at high speeds. 23 CFR §§ 646.214(b)(3)(C) and (D). Further support for the view that the limits in § 213.9(a) were set with safety concerns already in mind is found in § 213.9(c). Under that section, railroads may petition for permission from the Railroad Administrator to operate in excess of the maximum speed limit of 110 miles per hour, but only upon submission of information pertaining to the signals, grade crossing protections, and other devices that will allow safe operation.

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[14] See U. S. Dept. of Transportation, Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem iv (1971) ("Nearly all grade crossing accidents can be said to be attributable to some degree of 'driver error.' Thus, any effective program for improving [crossing] safety should be oriented around the driver and his needs in approaching, traversing, and leaving the crossing site as safely and efficiently as possible"); see also U. S. Department of Transportation, Federal Highway Administration, Rail-Highway Crossings Study 8–1 (1989) ("[T]he most influential predictors of train-vehicle accidents at rail-highway crossings are type of warning devices installed, highway traffic volumes, and train volumes. Less influential, but sometimes significant [is] maximum train speed . . .").

Read against this background, § 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings. Respondent nevertheless maintains that pre-emption is inappropriate because the Secretary's primary purpose in enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments. Section 434 does not, however, call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter of train speed. Respondent also argues that common-law speed restrictions are preserved by the second saving clause of § 434, under which "a State may . . . continue in force an additional or more stringent law . . . relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard . . . ." The state law on which respondent relies is concerned with local hazards only in the sense that its application turns on the facts of each case. The common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions. Respondent's contrary view would completely deprive the Secretary of the power to pre-empt state common law, a power clearly conferred by § 434. At the least, this renders respondent's reliance on the common law "incompatible with" FRSA and the Secretary's regulations. We thus conclude that respondent's excessive speed claim cannot stand in light of the Secretary's adoption of the regulations in § 213.9.[15]

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[15] Petitioner is prepared to concede that the pre-emption of respondent's excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual

IV

We hold that, under the FRSA, federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE THOMAS, with whom JUSTICE SOUTER joins, concurring in part and dissenting in part.

I believe that the Federal Railroad Safety Act and the Secretary of Transportation's implementing regulations preempt neither of respondent/cross-petitioner Easterwood's state-law tort claims. I therefore concur in Parts I and II of the Court's opinion but dissent from the remainder.

In Part III of its opinion, the Court holds that the Secretary's regulation setting "maximum allowable operating speeds for all freight and passenger trains" pre-empts Easterwood's claim that CSX "breached its common-law duty to operate its train at a moderate and safe rate of speed" below the federally specified maximum speed at the Cook Street crossing. *Ante*, at 673 (citing 49 CFR § 213.9(a) (1992)). The Court concedes, however, that "the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel *given the nature of the track on which they operate.*" *Ante*, at 674 (emphasis added). Likewise, CSX makes no effort to characterize any duty to reduce speed under Georgia law as a state-law obligation based on track safety, the precise "subject matter" "cover[ed]" by the Secretary's speed regulation. 45 U. S. C. § 434. Indeed, CSX admits that it shoulders a state-law duty to take measures

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hazard. Reply Brief for Petitioner in No. 91–790, p. 3. As respondent's complaint alleges only that petitioner's train was traveling too quickly given the "time and place," App. 4, this case does not present, and we do not address, the question of FRSA's pre-emptive effect on such related claims.

against crossing accidents, including an "attempt to stop or slow the train if possible to avoid a collision."[1] Reply Brief for Petitioner in No. 91–790, p. 3. The Court effectively agrees, as is evident from its decision to limit its opinion to a common-law negligence action for excessive speed and from its refusal to address related state-law claims for the violation of a statutory speed limit or the failure to avoid a specific hazard. See *ante,* at 675, and n. 15. For me, these concessions dictate the conclusion that Easterwood's excessive speed claim escapes pre-emption. Speed limits based solely on track characteristics, see 49 CFR §§213.51–213.143 (1992), cannot be fairly described as "substantially subsum[ing] the subject matter of . . . state law" regulating speed as a factor in grade crossing safety. *Ante,* at 664.

The Secretary's own explanation of his train speed regulation confirms my view that the federal speed standard does not pre-empt state regulation of train speed as a method of ensuring crossing safety. When the Secretary promulgated his speed regulation in conjunction with a set of track safety standards, he declined to consider "variable factors such as population density near the track" because these matters fell "beyond the scope of the notice of proposed rule making." 36 Fed. Reg. 20336 (1971). See also *id.,* at 11974 (notice of proposed rulemaking).[2] By contrast, the state law supporting Easterwood's excessive speed claim would impose liability on CSX for "operating [a] train at a speed that was greater than reasonable and safe" at a crossing "adjacent to a busily traveled thoroughfare." App. 4–5. Because the Secretary has not even considered how train speed affects crossing safety, much less "adopted a rule, regulation, order, or standard covering [that] subject matter," Georgia remains free to "continue in force any law" regulating train speed for this purpose. 45 U. S. C. § 434.

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[1] See generally Ga. Code Ann. §46–8–190(b) (1992) (requiring an "engineer operating [a] locomotive" to "exercise due care in approaching [a] crossing, in order to avoid doing injury to any person or property which may be on the crossing"); *Georgia Railroad & Banking Co.* v. *Cook,* 94 Ga. App. 650, 651–652, 95 S. E. 2d 703, 706–707 (1956); *Atlantic Coast Line R. Co.* v. *Bradshaw,* 34 Ga. App. 360, 129 S. E. 304 (1925).

[2] I reject the Solicitor General's contention that "[t]he Secretary has concluded that reduced train speeds do not represent an appropriate method of preventing crossing accidents." Brief for United States as *Amicus Curiae* 29. The very source cited in support of this proposition states that "[i]f a collision [at a crossing] seems unavoidable," a locomotive engineer "must decide whether the train should be slowed or put into emergency mode." Rail-Highway Crossings Study, Report of the Secretary of Transportation to the United States Congress 5–10

Only by invoking a broad regulatory "background" can the Court conclude that "§ 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions." *Ante,* at 675. It rests in part on the Manual on Uniform Traffic Control Devices for Streets and Highways, which has no pre-emptive effect by its own terms or under the federal regulations requiring compliance with it. See *ante,* at 668–670; 23 CFR § 646.214(b)(1) (1992) (permitting "State standards" to "supplemen[t]" the Manual). The Court goes so far as to rely on a federal crossing gate regulation that concededly does not govern the Cook Street site. Compare *ante,* at 674 ("[A]utomatic gates are required for federally funded projects"), with *ante,* at 672 ("These facts do not establish that federal funds 'participate[d] in the installation of the [warning] devices' at Cook Street") (quoting 23 CFR § 646.214(b)(3)(i) (1992)). Rather than attempt to excavate such scant evidence of pre-emption, I would follow the most natural reading of the Secretary's regulations: The Federal Government has chosen neither to regulate train speed as a factor affecting grade crossing safety nor to prevent States from doing so. The Court's contrary view of these regulations' pre-emptive effect may well create a jurisdictional gap in which States lack the power to patrol the potentially hazardous operation of trains at speeds below the applicable federal limit.

(Apr. 1989). The Secretary's original declaration that he did not consider crossing safety concerns therefore stands uncontradicted.

Had the Secretary wished to pre-empt *all* state laws governing train speed, he could have more explicitly defined the regulatory "subject matter" to be "cover[ed]." Doubtless such a decision would be true to Congress' declared intent that "laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U. S. C. § 434. To read the Secretary's existing maximum speed regulation as encompassing safety concerns unrelated to track characteristics, however, negates Congress' desire that state law be accorded "considerable solicitude." *Ante*, at 665. The "historic police powers of the States" to regulate train safety must not "be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Respect for the presumptive sanctity of state law should be no less when federal pre-emption occurs by administrative fiat rather than by congressional edict. See *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153–154 (1982).

I would uphold Easterwood's right to pursue both of the common-law tort claims at issue. Accordingly, I respectfully dissent from the Court's conclusion that the excessive speed claim is pre-empted.

WITHROW *v.* WILLIAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91–1030. Argued November 3, 1992—Decided April 21, 1993

After a police sergeant threatened to "lock [him] up" during a station house interrogation about a double murder, respondent Williams made inculpatory statements. He was then advised of his rights under *Miranda* v. *Arizona,* 384 U. S. 436, waived those rights, and made more inculpatory statements. The Michigan trial court declined to suppress his statements on the ground that he had been given timely *Miranda* warnings, and he was convicted of first-degree murder and related crimes. Williams subsequently commenced this habeas action *pro se,* alleging a *Miranda* violation as his principal ground for relief. The District Court granted relief, finding that all statements made between the sergeant's incarceration threat and Williams' receipt of *Miranda* warnings should have been suppressed. Without conducting an evidentiary hearing or entertaining argument, the court also ruled that the statements Williams made after receiving the *Miranda* warnings should have been suppressed as involuntary under the Due Process Clause of the Fourteenth Amendment. The Court of Appeals agreed on both points and affirmed, summarily rejecting the argument that the rule in *Stone* v. *Powell,* 428 U. S. 465—that when a State has given a full and fair chance to litigate a Fourth Amendment claim, federal habeas review is not available to a state prisoner alleging that his conviction rests on evidence obtained through an unconstitutional search or seizure—should apply to bar habeas review of Williams' *Miranda* claim.

Held:

1. *Stone*'s restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the *Miranda* safeguards. The *Stone* rule was not jurisdictional in nature, but was based on prudential concerns counseling against applying the Fourth Amendment exclusionary rule of *Mapp* v. *Ohio,* 367 U. S. 643, on collateral review. *Miranda* differs from *Mapp* with respect to such concerns, and *Stone* consequently does not apply. In contrast to *Mapp, Miranda* safeguards a fundamental trial right by protecting a defendant's Fifth Amendment privilege against self-incrimination. Moreover, *Miranda* facilitates the correct ascertainment of guilt by guarding against the use of unreliable statements at trial. Finally, and most importantly, eliminating review of

Miranda claims would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way. The burdens placed on busy federal courts would not be lightened, since it is reasonable to suppose that virtually every barred *Miranda* claim would simply be recast as a due process claim that the particular conviction rested on an involuntary confession. Furthermore, it is not reasonable to expect that, after 27 years of *Miranda,* the overturning of state convictions on the basis of that case will occur frequently enough to be a substantial cost of review or to raise federal-state tensions to an appreciable degree. Pp. 686–695.

2. The District Court erred in considering the involuntariness of the statements Williams made after receiving the *Miranda* warnings. The habeas petition raised no independent due process claim, and the record is devoid of any indication that petitioner consented under Federal Rule of Civil Procedure 15(b) to the determination of such a claim. Moreover, petitioner was manifestly prejudiced by the court's failure to afford her an opportunity to present evidence bearing on that claim's resolution. Pp. 695–696.

944 F. 2d 284, affirmed in part, reversed in part, and remanded.

SOUTER, J., delivered the opinion for a unanimous Court with respect to Part III, and the opinion of the Court with respect to Parts I, II, and IV, in which WHITE, BLACKMUN, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C. J., joined, *post,* p. 697. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which THOMAS, J., joined, *post,* p. 715.

Jeffrey Caminsky argued the cause for petitioner. With him on the briefs were *John D. O'Hair* and *Timothy A. Baughman.*

Deputy Solicitor General Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller,* and *Ronald J. Mann.*

Seth P. Waxman, by appointment of the Court, 504 U. S. 983, argued the cause for respondent. With him on the brief were *Scott L. Nelson* and *Daniel P. O'Neil.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Daniel E. Lungren,* Attorney General of California, *George Williamson,* Chief Assistant Attorney General, *Donald E. De Nicola,* JUSTICE SOUTER delivered the opinion of the Court.

In *Stone* v. *Powell,* 428 U. S. 465 (1976), we held that when a State has given a full and fair chance to litigate a Fourth Amendment claim, federal habeas review is not available to a state prisoner alleging that his conviction rests on evidence

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Deputy Attorney General, and *Mark L. Krotoski,* Special Assistant Attorney General, *James H. Evans,* Attorney General of Alabama, *Charles E. Cole,* Attorney General of Alaska, *Grant Woods,* Attorney General of Arizona, *Winston Bryant,* Attorney General of Arkansas, *Gale A. Norton,* Attorney General of Colorado, *Richard N. Palmer,* Chief State's Attorney of Connecticut, *Charles M. Oberly III,* Attorney General of Delaware, *Robert A. Butterworth,* Attorney General of Florida, *Michael J. Bowers,* Attorney General of Georgia, *Warren Price III,* Attorney General of Hawaii, *Larry EchoHawk,* Attorney General of Idaho, *Linley E. Pearson,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, *Chris Gorman,* Attorney General of Kentucky, *Richard P. Ieyoub,* Attorney General of Louisiana, *Scott Harshbarger,* Attorney General of Massachusetts, *Michael C. Moore,* Attorney General of Mississippi, *William L. Webster,* Attorney General of Missouri, *Marc Racicot,* Attorney General of Montana, *Don Stenberg,* Attorney General of Nebraska, *Frankie Sue Del Papa,* Attorney General of Nevada, *John P. Arnold,* Attorney General of New Hampshire, *Robert J. Del Tufo,* Attorney General of New Jersey, *Tom Udall,* Attorney General of New Mexico, *Lacy H. Thornburg,* Attorney General of North Carolina, *Lee Fisher,* Attorney General of Ohio, *T. Travis Medlock,* Attorney General of South Carolina, *Mark W. Barnett,* Attorney General of South Dakota, *Charles W. Burson,* Attorney General of Tennessee, *R. Paul Van Dam,* Attorney General of Utah, *Jeffrey L. Amestoy,* Attorney General of Vermont, *Mary Sue Terry,* Attorney General of Virginia, *Kenneth O. Eikenberry,* Attorney General of Washington, *Mario J. Palumbo,* Attorney General of West Virginia, and *Joseph B. Meyer,* Attorney General of Wyoming; for Americans for Effective Law Enforcement, Inc., et al. by *Thomas J. Charron, Bernard J. Farber, Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Larry W. Yackle, Steven R. Shapiro, Leslie A. Harris, and *John A. Powell* filed a brief for the American Civil Liberties Union et al. as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Bar Association by *Talbot D'Alemberte* and *William J. Mertens;* and for the Police Foundation et al. by *Joseph D. Tydings* and *Michael Millemann.*

obtained through an unconstitutional search or seizure. Today we hold that *Stone*'s restriction on the exercise of federal habeas jurisdiction does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

I

Police officers in Romulus, Michigan, learned that respondent, Robert Allen Williams, Jr., might have information about a double murder committed on April 6, 1985. On April 10, two officers called at Williams's house and asked him to the police station for questioning. Williams agreed to go. The officers searched Williams, but did not handcuff him, and they all drove to the station in an unmarked car. One officer, Sergeant David Early, later testified that Williams was not under arrest at this time, although a contemporaneous police report indicates that the officers arrested Williams at his residence. App. 12a–13a, 24a–26a.

At the station, the officers questioned Williams about his knowledge of the crime. Although he first denied any involvement, he soon began to implicate himself, and the officers continued their questioning, assuring Williams that their only concern was the identity of the "shooter." After consulting each other, the officers decided not to advise Williams of his rights under *Miranda* v. *Arizona, supra.* See App. to Pet. for Cert. 48a. When Williams persisted in denying involvement, Sergeant Early reproved him:

> "You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up and you can just tell it to a defense attorney and let him try and prove differently." *Ibid.*

The reproof apparently worked, for Williams then admitted he had furnished the murder weapon to the killer, who had called Williams after the crime and told him where he had discarded the weapon and other incriminating items. Williams maintained that he had not been present at the crime scene.

Only at this point, some 40 minutes after they began questioning him, did the officers advise Williams of his *Miranda* rights. Williams waived those rights and during subsequent questioning made several more inculpatory statements. Despite his prior denial, Williams admitted that he had driven the murderer to and from the scene of the crime, had witnessed the murders, and had helped the murderer dispose of incriminating evidence. The officers interrogated Williams again on April 11 and April 12, and, on April 12, the State formally charged him with murder.

Before trial, Williams moved to suppress his responses to the interrogations, and the trial court suppressed the statements of April 11 and April 12 as the products of improper delay in arraignment under Michigan law. See App. to Pet. for Cert. 90a–91a. The court declined to suppress the statements of April 10, however, ruling that the police had given Williams a timely warning of his *Miranda* rights. *Id.*, at 90a. A bench trial led to Williams's conviction on two counts each of first-degree murder and possession of a firearm during the commission of a felony and resulted in two concurrent life sentences. The Court of Appeals of Michigan affirmed the trial court's ruling on the April 10 statements, *People* v. *Williams*, 171 Mich. App. 234, 429 N. W. 2d 649 (1988), and the Supreme Court of Michigan denied leave to appeal, 432 Mich. 913, 440 N. W. 2d 416 (1989). We denied the ensuing petition for writ of certiorari. *Williams* v. *Michigan*, 493 U. S. 956 (1989).

Williams then began this action *pro se* by petitioning for a writ of habeas corpus in the District Court, alleging a violation of his *Miranda* rights as the principal ground for relief.

Petition for Writ of Habeas Corpus in No. 90CV–70256, p. 5 (ED Mich.). The District Court granted relief, finding that the police had placed Williams in custody for *Miranda* purposes when Sergeant Early had threatened to "lock [him] up," and that the trial court should accordingly have excluded all statements Williams had made between that point and his receipt of the *Miranda* warnings. App. to Pet. for Cert. 49a–52a. The court also concluded, though neither Williams nor petitioner had addressed the issue, that Williams's statements after receiving the *Miranda* warnings were involuntary under the Due Process Clause of the Fourteenth Amendment and thus likewise subject to suppression. App. to Pet. for Cert. 52a–71a. The court found that the totality of circumstances, including repeated promises of lenient treatment if he told the truth, had overborne Williams's will.[1]

The Court of Appeals affirmed, 944 F. 2d 284 (CA6 1991), holding the District Court correct in determining the police had subjected Williams to custodial interrogation before giving him the requisite *Miranda* advice, and in finding the statements made after receiving the *Miranda* warnings involuntary. *Id.*, at 289–290. The Court of Appeals summarily rejected the argument that the rule in *Stone* v. *Powell,* 428 U. S. 465 (1976), should apply to bar habeas review of Williams's *Miranda* claim. 944 F. 2d, at 291. We granted certiorari to resolve the significant issue thus presented. 503 U. S. 983 (1992).[2]

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[1] The District Court mistakenly believed that the trial court had allowed the introduction of the statements Williams had made on April 12, and its ruling consequently extended to those statements as well. App. to Pet. for Cert. 72a–75a.

[2] JUSTICE SCALIA argues in effect that the rule in *Stone* v. *Powell,* 428 U. S. 465 (1976), should extend to all claims on federal habeas review. See *post,* at 719–720. With respect, that reasoning goes beyond the question on which we granted certiorari, Pet. for Cert. 1 ("where the premise of [a] Fifth Amendment ruling is a finding of a *Miranda* violation, where the petitioner has had one full and fair opportunity to raise the *Miranda* claim

II

We have made it clear that *Stone*'s limitation on federal habeas relief was not jurisdictional in nature,[3] but rested on prudential concerns counseling against the application of the Fourth Amendment exclusionary rule on collateral review. See *Stone, supra,* at 494–495, n. 37; see also *Kuhlmann* v. *Wilson,* 477 U. S. 436, 447 (1986) (opinion of Powell, J.) (discussing equitable principles underlying *Stone*); *Kimmelman* v. *Morrison,* 477 U. S. 365, 379, n. 4 (1986); *Allen* v. *McCurry,* 449 U. S. 90, 103 (1980) (*Stone* concerns "the prudent exercise of federal-court jurisdiction under 28 U. S. C. § 2254"); cf. 28 U. S. C. § 2243 (court entertaining habeas petition shall "dispose of the matter as law and justice require"). We simply concluded in *Stone* that the costs of applying the exclusionary rule on collateral review outweighed any potential advantage to be gained by applying it there. *Stone, supra,* at 489–495.

We recognized that the exclusionary rule, held applicable to the States in *Mapp* v. *Ohio,* 367 U. S. 643 (1961), "is not a personal constitutional right"; it fails to redress "the injury to the privacy of the victim of the search or seizure" at issue, "for any '[r]eparation comes too late.'" *Stone, supra,* at 486 (quoting *Linkletter* v. *Walker,* 381 U. S. 618, 637 (1965)). The rule serves instead to deter future Fourth Amendment violations, and we reasoned that its application on collateral review would only marginally advance this interest in deterrence. *Stone,* 428 U. S., at 493. On the other side of the ledger, the costs of applying the exclusionary rule on habeas

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in state court, should collateral review of the same claim on a habeas corpus petition be precluded?"), and we see no good reason to address it in this case.

[3] Title 28 U. S. C. § 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

were comparatively great. We reasoned that doing so would not only exclude reliable evidence and divert attention from the central question of guilt, but would also intrude upon the public interest in "'(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.'" *Id.*, at 491, n. 31 (quoting *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 259 (1973) (Powell, J., concurring)).

Over the years, we have repeatedly declined to extend the rule in *Stone* beyond its original bounds. In *Jackson* v. *Virginia,* 443 U. S. 307 (1979), for example, we denied a request to apply *Stone* to bar habeas consideration of a Fourteenth Amendment due process claim of insufficient evidence to support a state conviction. We stressed that the issue was "central to the basic question of guilt or innocence," *Jackson,* 443 U. S., at 323, unlike a claim that a state court had received evidence in violation of the Fourth Amendment exclusionary rule, and we found that to review such a claim on habeas imposed no great burdens on the federal courts. *Id.*, at 321–322.

After a like analysis, in *Rose* v. *Mitchell,* 443 U. S. 545 (1979), we decided against extending *Stone* to foreclose habeas review of an equal protection claim of racial discrimination in selecting a state grand-jury foreman. A charge that state adjudication had violated the direct command of the Fourteenth Amendment implicated the integrity of the judicial process, we reasoned, *Rose,* 443 U. S., at 563, and failed to raise the "federalism concerns" that had driven the Court in *Stone.* 443 U. S., at 562. Since federal courts had granted relief to state prisoners upon proof of forbidden discrimination for nearly a century, we concluded, "confirmation that habeas corpus remains an appropriate vehicle by which federal courts are to exercise their Fourteenth Amendment responsibilities" would not likely raise tensions between the state and federal judicial systems. *Ibid.*

In a third instance, in *Kimmelman* v. *Morrison, supra,* we again declined to extend *Stone,* in that case to bar habeas review of certain claims of ineffective assistance of counsel under the Sixth Amendment. We explained that unlike the Fourth Amendment, which confers no "trial right," the Sixth confers a "fundamental right" on criminal defendants, one that "assures the fairness, and thus the legitimacy, of our adversary process." 477 U. S., at 374. We observed that because a violation of the right would often go unremedied except on collateral review, "restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation." *Id.,* at 378.

In this case, the argument for extending *Stone* again falls short.[4] To understand why, a brief review of the derivation of the *Miranda* safeguards, and the purposes they were designed to serve, is in order.

The Self-Incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. In *Bram* v. *United States,* 168 U. S. 532 (1897), the Court held that the Clause barred the introduction in federal cases of involuntary confessions made in response to custodial interrogation. We did not recognize the Clause's applicability to state cases until 1964, however, see *Malloy* v. *Hogan,* 378 U. S. 1; and, over the course of 30 years, beginning with the decision in *Brown* v. *Mississippi,* 297 U. S. 278 (1936), we analyzed the admissibility of confessions in such cases as a question of due process under the Fourteenth Amendment. See Stone, The Miranda Doctrine in the Burger Court, 1977 S. Ct. Rev. 99, 101–102. Under this approach, we examined the totality of circumstances to determine whether a confession had been "'made freely, voluntarily and without compulsion or inducement of any sort.'" *Haynes* v. *Washington,* 373 U. S. 503, 513 (1963) (quoting *Wilson* v. *United States,* 162 U. S. 613, 623 (1896)); see also *Schneckloth* v. *Bustamonte, supra,* at 223–227 (discussing totality-of-circumstances approach). See generally 1 W. LaFave & J. Israel, Criminal Procedure § 6.2 (1984). Indeed, we continue to employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process. *E. g., Arizona* v. *Fulminante,* 499 U. S. 279 (1991); *Miller* v. *Fenton,* 474 U. S. 104, 109–110 (1985).

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[4] We have in the past declined to address the application of *Stone* in this context. See, *e. g., Duckworth* v. *Eagan,* 492 U. S. 195, 201, n. 3 (1989); *Wainwright* v. *Sykes,* 433 U. S. 72, 87, n. 11 (1977).

In *Malloy,* we recognized that the Fourteenth Amendment incorporates the Fifth Amendment privilege against self-incrimination, and thereby opened *Bram*'s doctrinal avenue for the analysis of state cases. So it was that two years later we held in *Miranda* that the privilege extended to state custodial interrogations. In *Miranda,* we spoke of the privilege as guaranteeing a person under interrogation "the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will,'" 384 U. S., at 460 (quoting *Malloy, supra,* at 8), and held that "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U. S., at 467. To counter these pressures we prescribed, absent "other fully effective means," the now-familiar measures in aid of a defendant's Fifth Amendment privilege:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity

> to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.*, at 479.

Unless the prosecution can demonstrate the warnings and waiver as threshold matters, we held, it may not overcome an objection to the use at trial of statements obtained from the person in any ensuing custodial interrogation. See *ibid.;* cf. *Oregon* v. *Hass,* 420 U. S. 714, 721–723 (1975) (permitting use for impeachment purposes of statements taken in violation of *Miranda*).

Petitioner, supported by the United States as *amicus curiae,* argues that *Miranda*'s safeguards are not constitutional in character, but merely "prophylactic," and that in consequence habeas review should not extend to a claim that a state conviction rests on statements obtained in the absence of those safeguards. Brief for Petitioner 91–93; Brief for United States as *Amicus Curiae* 14–15. We accept petitioner's premise for purposes of this case, but not her conclusion.

The *Miranda* Court did of course caution that the Constitution requires no "particular solution for the inherent compulsions of the interrogation process," and left it open to a State to meet its burden by adopting "other procedures . . . at least as effective in apprising accused persons" of their rights. 384 U. S., at 467. The Court indeed acknowledged that, in barring introduction of a statement obtained without the required warnings, *Miranda* might exclude a confession that we would not condemn as "involuntary in traditional terms," *id.*, at 457, and for this reason we have sometimes called the *Miranda* safeguards "prophylactic" in nature. *E. g., Duckworth* v. *Eagan,* 492 U. S. 195, 203 (1989); *Connecticut* v. *Barrett,* 479 U. S. 523, 528 (1987); *Oregon* v. *Elstad,* 470 U. S. 298, 305 (1985); *New York* v. *Quarles,* 467 U. S. 649, 654 (1984); see *Michigan* v. *Tucker,* 417 U. S. 433, 444 (1974)

(*Miranda* Court "recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"). But cf. *Quarles, supra,* at 660 (opinion of O'CONNOR, J.) (*Miranda* Court "held unconstitutional, because inherently compelled, the admission of statements derived from in-custody questioning not preceded by an explanation of the privilege against self-incrimination and the consequences of forgoing it"). Calling the *Miranda* safeguards "prophylactic," however, is a far cry from putting *Miranda* on all fours with *Mapp,* or from rendering *Miranda* subject to *Stone.*

As we explained in *Stone,* the *Mapp* rule "is not a personal constitutional right," but serves to deter future constitutional violations; although it mitigates the juridical consequences of invading the defendant's privacy, the exclusion of evidence at trial can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation. *Stone,* 428 U. S., at 486. Nor can the *Mapp* rule be thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial. Quite the contrary, as we explained in *Stone,* the evidence excluded under *Mapp* "is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." 428 U. S., at 490.

Miranda differs from *Mapp* in both respects. "Prophylactic" though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards "a fundamental *trial* right." *United States* v. *Verdugo-Urquidez,* 494 U. S. 259, 264 (1990) (emphasis added); cf. *Kimmelman,* 477 U. S., at 377 (*Stone* does not bar habeas review of claim that the personal trial right to effective assistance of counsel has been violated). The privilege embodies "principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle," *Bram,* 168 U. S., at 544, and reflects

> "many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;' our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life;' our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" *Murphy* v. *Waterfront Comm'n of New York Harbor,* 378 U. S. 52, 55 (1964) (citations omitted).

Nor does the Fifth Amendment "trial right" protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt. "'[A] system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation." *Michigan* v. *Tucker, supra,* at 448, n. 23 (quoting *Escobedo* v. *Illinois,* 378 U. S. 478, 488–489 (1964)). By bracing against "the possibility of unreliable statements in every instance of in-custody interrogation," *Miranda* serves to guard against "the use of unreliable statements at trial." *Johnson* v. *New Jersey,* 384 U. S. 719, 730 (1966); see also *Schneckloth,* 412 U. S., at 240 (*Miranda* "Court made it clear that the basis for decision was the need to protect the fairness of the trial itself"); Halpern, Federal Habeas Corpus and the *Mapp* Exclusionary Rule after *Stone* v. *Powell,* 82 Colum. L. Rev. 1, 40 (1982); cf. *Rose* v. *Mitchell,* 443 U. S. 545 (1979) (*Stone* does not bar habeas review of claim of racial discrimination in selection of grand-jury foreman, as this claim goes to the integrity of the judicial process).

Finally, and most importantly, eliminating review of *Miranda* claims would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way. As one *amicus* concedes, eliminating habeas review of *Miranda* issues would not prevent a state prisoner from simply converting his barred *Miranda* claim into a due process claim that his conviction rested on an involuntary confession. See Brief for United States as *Amicus Curiae* 17. Indeed, although counsel could provide us with no empirical basis for projecting the consequence of adopting petitioner's position, see Tr. of Oral Arg. 9–11, 19–21, it seems reasonable to suppose that virtually all *Miranda* claims would simply be recast in this way.[5]

If that is so, the federal courts would certainly not have heard the last of *Miranda* on collateral review. Under the due process approach, as we have already seen, courts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances include not only the crucial element of police coercion, *Colorado* v. *Connelly,* 479 U. S. 157, 167 (1986); the length of the interrogation, *Ashcraft* v. *Tennessee,* 322 U. S. 143, 153–154 (1944); its location, see *Reck* v. *Pate,* 367 U. S. 433, 441 (1961); its continuity, *Leyra* v. *Denno,* 347 U. S. 556, 561 (1954); the defendant's maturity, *Haley* v. *Ohio,* 332 U. S. 596, 599–601 (1948) (opinion of Douglas, J.); education, *Clewis* v. *Texas,* 386 U. S. 707, 712 (1967); physical condition, *Greenwald* v. *Wisconsin,* 390 U. S. 519, 520–521 (1968) *(per curiam);* and mental health, *Fikes* v. *Alabama,* 352 U. S. 191, 196 (1957). They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation. *Haynes* v. *Washington,* 373 U. S. 503, 516–517 (1963); Brief for United States as *Amicus Curiae* 19, n. 17; see also *Schneckloth, supra,* at 226 (discussing factors). We could lock the front door against *Miranda,* but not the back.

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[5] JUSTICE O'CONNOR is confident that many such claims would be unjustified, see *post,* at 708–709, but that is beside the point. Justifiability is not much of a gatekeeper on habeas.

We thus fail to see how abdicating *Miranda*'s bright-line (or, at least, brighter-line) rules in favor of an exhaustive totality-of-circumstances approach on habeas would do much of anything to lighten the burdens placed on busy federal courts. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 188 (3d ed. 1988, Supp. 1992); Halpern, *supra,* at 40; Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 891 (1981); see also *Quarles,* 467 U. S., at 664 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (quoting *Fare* v. *Michael C.,* 439 U. S. 1310, 1314 (1978) (REHNQUIST, J., in chambers)) (*Miranda*'s " 'core virtue' " was " 'afford[ing] police and courts clear guidance on the manner in which to conduct a custodial investigation' "). We likewise fail to see how purporting to eliminate *Miranda* issues from federal habeas would go very far to relieve such tensions as *Miranda* may now raise between the two judicial systems. Relegation of habeas petitioners to straight involuntariness claims would not likely reduce the amount of litigation, and each such claim would in any event present a legal question requiring an "independent federal determination" on habeas. *Miller* v. *Fenton,* 474 U. S., at 112.

One might argue that tension results between the two judicial systems whenever a federal habeas court overturns a state conviction on finding that the state court let in a voluntary confession obtained by the police without the *Miranda* safeguards. And one would have to concede that this has occurred in the past, and doubtless will occur again. It is not reasonable, however, to expect such occurrences to be frequent enough to amount to a substantial cost of reviewing

Miranda claims on habeas or to raise federal-state tensions to an appreciable degree. See Tr. of Oral Arg. 11, 21. We must remember in this regard that *Miranda* came down some 27 years ago. In that time, law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements. See *Quarles, supra,* at 663 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (quoting *Rhode Island* v. *Innis,* 446 U. S. 291, 304 (1980) (Burger, C. J., concurring in judgment)) ("'meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures'"); Schulhofer, Reconsidering *Miranda,* 54 U. Chi. L. Rev. 435, 455–457 (1987).[6] And if, finally, one should question the need for federal collateral review of requirements that merit such respect, the answer simply is that the respect is sustained in no small part by the existence of such review. "It is the occasional abuse that the federal writ of habeas corpus stands ready to correct." *Jackson,* 443 U. S., at 322.

III

One final point should keep us only briefly. As he had done in his state appellate briefs, on habeas Williams raised only one claim going to the admissibility of his statements to the police: that the police had elicited those statements without satisfying the *Miranda* requirements. See *supra,* at 684. In her answer, petitioner addressed only that claim. See Brief in Support of Answer in No. 90CV–70256 DT, p. 3 (ED Mich.). The District Court, nonetheless, without an evidentiary hearing or even argument, went beyond the habeas petition and found the statements Williams made after receiving the *Miranda* warnings to be involuntary under due process criteria. Before the Court of Appeals, petitioner objected to the District Court's due process enquiry on the ground that the habeas petition's reference to *Miranda* rights had given her insufficient notice to address a due process claim. Brief for Respondent-Appellant in No. 90–2289, p. 6 (CA6). Petitioner pursues the objection here. See Pet. for Cert. 1; Brief for Petitioner 14–15, n. 2.

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[6] It should indeed come as no surprise that one of the submissions arguing against the extension of *Stone* in this case comes to us from law enforcement organizations. See Brief for Police Foundation et al. as *Amici Curiae.*

Williams effectively concedes that his habeas petition raised no involuntariness claim, but he argues that the matter was tried by the implied consent of the parties under Federal Rule of Civil Procedure 15(b),[7] and that petitioner can demonstrate no prejudice from the District Court's action. See Brief for Respondent 41–42, n. 22. The record, however, reveals neither thought, word, nor deed of petitioner that could be taken as any sort of consent to the determination of an independent due process claim, and petitioner was manifestly prejudiced by the District Court's failure to afford her an opportunity to present evidence bearing on that claim's resolution. The District Court should not have addressed the involuntariness question in these circumstances.[8]

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[7] The relevant part of Rule 15(b) provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues." See 28 U. S. C. § 2254 Rule 11 (application of Federal Rules of Civil Procedure to habeas petitions); 1 J. Liebman, Federal Habeas Corpus Practice and Procedure § 17.2 (1988) (Rule 15 applies in habeas actions).

[8] We need not address petitioner's arguments that Williams failed to exhaust the involuntariness claim in the state courts and that the District Court applied a new rule under *Teague* v. *Lane*, 489 U. S. 288 (1989). Of course, we also express no opinion on the merits of the involuntariness claim.

IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

Today the Court permits the federal courts to overturn on habeas the conviction of a double murderer, not on the basis of an inexorable constitutional or statutory command, but because it believes the result desirable from the standpoint of equity and judicial administration. Because the principles that inform our habeas jurisprudence—finality, federalism, and fairness—counsel decisively against the result the Court reaches, I respectfully dissent from this holding.

I

The Court does not sit today in direct review of a state-court judgment of conviction. Rather, respondent seeks relief by collaterally attacking his conviction through the writ of habeas corpus. While petitions for the writ of habeas corpus are now commonplace—over 12,000 were filed in 1990, compared to 127 in 1941—their current ubiquity ought not detract from the writ's historic importance. See L. Mecham, Annual Report of the Director of the Administrative Office of the United States Courts 191 (1991) (1990 figures); *Fay* v. *Noia,* 372 U. S. 391, 446, n. 2 (1963) (Clark, J., dissenting) (1941 figures). "The Great Writ" can be traced through the common law to well before the founding of this Nation; its role as a "prompt and efficacious remedy for whatever society deems to be intolerable restraints" is beyond question. *Fay,* 372 U. S., at 401–402. As Justice Harlan explained:

> "*Habeas corpus ad subjiciendum* is today, as it has always been, a fundamental safeguard against unlawful

> custody. . . . Although the wording of earlier statutory provisions has been changed, the basic question before the court to which the writ is addressed has always been the same: in the language of the present statute, on the books since 1867, is the detention complained of 'in violation of the Constitution or laws or treaties of the United States'?" *Id.*, at 449 (dissenting opinion).

Nonetheless, we repeatedly have recognized that collateral attacks raise numerous concerns not present on direct review. Most profound is the effect on finality. It goes without saying that, at some point, judicial proceedings must draw to a close and the matter deemed conclusively resolved; no society can afford forever to question the correctness of its every judgment. "[T]he writ," however, "strikes at finality," *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991), depriving the criminal law "of much of its deterrent effect," *Teague* v. *Lane*, 489 U. S. 288, 309 (1989) (plurality opinion), and sometimes preventing the law's just application altogether, see *McCleskey, supra*, at 491. "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Mackey* v. *United States*, 401 U. S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part); see also *McCleskey, supra*, at 492.

In our federal system, state courts have primary responsibility for enforcing constitutional rules in their own criminal trials. When a case comes before the federal courts on habeas rather than on direct review, the judicial role is "significantly different." *Mackey, supra*, at 682 (Harlan, J., concurring in part and dissenting in part). Accord, *Teague, supra*, at 306–308. Most important here, federal courts on direct review adjudicate every issue of federal law properly presented; in contrast, "federal courts have never had a similar obligation on habeas corpus." *Mackey, supra*, at 682

(Harlan, J., concurring in part and dissenting in part). As the Court explains today, federal courts exercising their habeas powers may refuse to grant relief on certain claims because of "prudential concerns" such as equity and federalism. *Ante*, at 686. This follows not only from the express language of the habeas statute, which directs the federal courts to "dispose of [habeas petitions] as law and justice require," 28 U. S. C. § 2243, but from our precedents as well. In *Francis* v. *Henderson*, 425 U. S. 536 (1976), we stated that "[t]his Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." *Id.*, at 539. Accord, *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 653–654 (1992) ("Whether [a] claim is framed as a habeas petition or as a [42 U. S. C.] § 1983 action, [what is sought is] an equitable remedy"; as a result, equity must be "take[n] into consideration"); *Fay* v. *Noia*, *supra*, at 438 ("[H]abeas corpus has traditionally been regarded as governed by equitable principles"); *Duckworth* v. *Eagan*, 492 U. S. 195, 213 (1989) (O'CONNOR, J., concurring) ("[T]he Court has long recognized that habeas corpus [is] governed by equitable principles" (internal quotation marks omitted)).

Concerns for equity and federalism resonate throughout our habeas jurisprudence. In 1886, only eight years after Congress gave the federal courts power to issue writs ordering the release of state prisoners, this Court explained that courts could accommodate federalism and comity concerns by withholding relief until after state proceedings had terminated. *Ex parte Royall*, 117 U. S. 241, 251–253. Accord, *Fay*, *supra*, at 418–419. More recently, we relied on those same concerns in holding that new constitutional rules of criminal procedure do not apply retroactively on habeas. *Teague*, *supra*, at 306. Our treatment of successive petitions and procedurally defaulted claims similarly is governed by equitable principles. *McCleskey*, 499 U. S., at 489–491 (successive petitions); *id.*, at 490 (procedurally defaulted claims); *Fay, supra,* at 438 (procedurally defaulted claims). Most telling of all, this Court continuously has recognized that the ultimate equity on the prisoner's side—a sufficient showing of actual innocence—is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim. See *Sawyer* v. *Whitley,* 505 U. S. 333, 340–347 (1992) (actual innocence of penalty); *Murray* v. *Carrier,* 477 U. S. 478, 496 (1986) (federal courts may reach procedurally defaulted claims on a showing that a constitutional violation probably resulted in the conviction of an actually innocent person); *Kuhlmann* v. *Wilson,* 477 U. S. 436, 454 (1986) (colorable showing of actual innocence suffices to excuse successive claim); see also *Teague* v. *Lane, supra,* at 313 (where absence of procedure seriously diminishes the likelihood of an accurate conviction, a new rule requiring the procedure may be applied retroactively on habeas).

Nonetheless, decisions concerning the availability of habeas relief warrant restraint. Nowhere is the Court's restraint more evident than when it is asked to exclude a substantive category of issues from relitigation on habeas. Although we recognized the possibility of excluding certain types of claims long ago, see *Mackey, supra,* at 683 (Harlan, J., concurring in part and dissenting in part), only once has this Court found that the concerns of finality, federalism, and fairness supported such a result; that was in *Stone* v. *Powell,* 428 U. S. 465 (1976). *Ante,* at 686. Since then, the Court has refused to bar additional categories of claims on three different occasions. *Ante,* at 687–688.

Today we face the question whether *Stone* v. *Powell* should extend to bar claims on habeas that the prophylactic rule of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), had been violated. Continuing the tradition of caution in this area, the Court answers that question in the negative. This time I must disagree. In my view, the "prudential concerns," *ante*, at 686, that inform our habeas jurisprudence counsel the exclusion of *Miranda* claims just as strongly as they did the exclusionary rule claims at issue in *Stone* itself.

II

In *Stone*, the Court explained that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), was not an inevitable product of the Constitution but instead "'a judicially created remedy.'" *Stone*, *supra*, at 486 (quoting *United States* v. *Calandra*, 414 U. S. 338, 349 (1974)). By threatening to exclude highly probative and sometimes critical evidence, the exclusionary rule "is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." *Stone*, 428 U. S., at 492. The deterrent effect is strong: Any transgression of the Fourth Amendment carries the risk that evidence will be excluded at trial. Nonetheless, this increased sensitivity to Fourth Amendment values carries a high cost. Exclusion not only deprives the jury of probative and sometimes dispositive evidence, but also "deflects the truthfinding process and often frees the guilty." *Id.*, at 490. When that happens, it is not just the executive or the judiciary but all of society that suffers: The executive suffers because the police lose their suspect and the prosecutor the case; the judiciary suffers because its processes are diverted from the central mission of ascertaining the truth; and society suffers because the populace again finds a guilty and potentially dangerous person in its midst, solely because a police officer bungled.

While that cost is considered acceptable when a case is on direct review, the balance shifts decisively once the case is on habeas. There is little marginal benefit to enforcing the exclusionary rule on habeas; the penalty of exclusion comes too late to produce a noticeable deterrent effect. *Id.*, at 493. Moreover, the rule "divert[s attention] from the ultimate question of guilt," squanders scarce federal judicial resources, intrudes on the interest in finality, creates friction between the state and federal systems of justice, and upsets the "'constitutional balance upon which the doctrine of federalism is founded.'" *Id.*, at 490, 491, n. 31 (quoting *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 259 (1973) (Powell, J., concurring)). Because application of the exclusionary rule on habeas "offend[s] important principles of federalism and finality in the criminal law which have long informed the federal courts' exercise of habeas jurisdiction," *Duckworth*, 492 U. S., at 208 (O'CONNOR, J., concurring), we held in *Stone* that such claims would no longer be cognizable on habeas so long as the State already had provided the defendant with a full and fair opportunity to litigate.

I continue to believe that these same considerations apply to *Miranda* claims with equal, if not greater, force. See *Duckworth, supra*, at 209 (O'CONNOR, J., concurring). Like the suppression of the fruits of an illegal search or seizure, the exclusion of statements obtained in violation of *Miranda* is not constitutionally required. This Court repeatedly has held that *Miranda*'s warning requirement is not a dictate of the Fifth Amendment itself, but a prophylactic rule. See, *e. g., McNeil* v. *Wisconsin*, 501 U. S. 171, 176 (1991); *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990); *Duckworth, supra*, at 203; *New York* v. *Quarles*, 467 U. S. 649, 654 (1984); *Michigan* v. *Tucker*, 417 U. S. 433, 442–446 (1974). Because *Miranda* "sweeps more broadly than the Fifth Amendment itself," it excludes some confessions even though the Constitution would not. *Oregon* v. *Elstad*, 470 U. S. 298, 306 (1985). Indeed, "in the individual case, *Miranda*'s preventive medicine [often] provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Id.*, at 307.

Miranda's overbreadth, of course, is not without justification. The exclusion of unwarned statements provides a strong incentive for the police to adopt "procedural safeguards," *Miranda*, 384 U. S., at 444, against the exaction of compelled or involuntary statements. It also promotes institutional respect for constitutional values. But, like the exclusionary rule for illegally seized evidence, *Miranda*'s prophylactic rule does so at a substantial cost. Unlike involuntary or compelled statements—which are of dubious reliability and are therefore inadmissible for any purpose—confessions obtained in violation of *Miranda* are not necessarily untrustworthy. In fact, because *voluntary* statements are "trustworthy" even when obtained without proper warnings, *Johnson* v. *New Jersey,* 384 U. S. 719, 731 (1966), their suppression actually *impairs* the pursuit of truth by concealing probative information from the trier of fact. See *Harvey, supra,* at 350 (*Miranda* "result[s] in the exclusion of some voluntary and reliable statements"); *Elstad, supra,* at 312 (loss of "highly probative evidence of a voluntary confession" is a "high cost [for] law enforcement"); *McNeil, supra,* at 181 (because "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," the exclusion of such confessions renders society "the loser"); *Tucker, supra,* at 461 (WHITE, J., concurring in judgment) ("[H]aving relevant and probative testimony, not obtained by actual coercion . . . aid[s] in the pursuit of truth"); *Miranda, supra,* at 538 (WHITE, J., dissenting) ("Particularly when corroborated, . . . such [voluntary] confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty").

When the case is on direct review, that damage to the truth-seeking function is deemed an acceptable sacrifice for the deterrence and respect for constitutional values that the *Miranda* rule brings. But once a case is on collateral review, the balance between the costs and benefits shifts; the interests of federalism, finality, and fairness compel *Miranda*'s exclusion from habeas. The benefit of enforcing *Miranda* through habeas is marginal at best. To the extent *Miranda* ensures the exclusion of involuntary statements, that task can be performed more accurately by adjudicating the voluntariness question directly. See *Johnson, supra,* at 730–731. And, to the extent exclusion of voluntary but unwarned confessions serves a deterrent function, "[t]he awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility . . . will have any appreciable effect on police training or behavior." *Duckworth, supra,* at 211 (O'CONNOR, J., concurring). Judge Friendly made precisely the same point 18 years earlier: "[T]he deterrent value of permitting collateral attack," he explained, "goes beyond the point of diminishing returns." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 163 (1970).

Despite its meager benefits, the relitigation of *Miranda* claims on habeas imposes substantial costs. Just like the application of the exclusionary rule, application of *Miranda*'s prophylactic rule on habeas consumes scarce judicial resources on an issue unrelated to guilt or innocence. No less than the exclusionary rule, it undercuts finality. It creates tension between the state and federal courts. And it upsets the division of responsibilities that underlies our federal system. But most troubling of all, *Miranda*'s application on habeas sometimes precludes the just application of law altogether. The order excluding the statement will often be issued "years after trial, when a new trial may be a practical impossibility." *Duckworth,* 492 U. S., at 211 (O'CONNOR, J., concurring). Whether the Court admits it or not, the grim result of applying *Miranda* on habeas will be, time and time again, "the release of an admittedly guilty individual who may pose a continuing threat to society." *Ibid.*

Any rule that so demonstrably renders truth and society "the loser," *McNeil* v. *Wisconsin,* 501 U. S., at 181, "'bear[s] a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness,'" *United States* v. *Leon,* 468 U. S. 897, 908, n. 6 (1984) (quoting *Illinois* v. *Gates,* 462 U. S. 213, 257–

258 (1983) (WHITE, J., concurring in judgment)). That burden is heavier still on collateral review. In light of the meager deterrent benefit it brings and the tremendous costs it imposes, in my view application of *Miranda*'s prophylactic rule on habeas "falls short" of justification. *Ante,* at 688.

III

The Court identifies a number of differences that, in its view, distinguish this case from *Stone* v. *Powell. Ante,* at 691–695. I am sympathetic to the Court's concerns but find them misplaced nonetheless.

The first difference the Court identifies concerns the nature of the right protected. *Miranda,* the Court correctly points out, fosters Fifth Amendment, rather than Fourth Amendment, values. *Ante,* at 691. The Court then offers a defense of the Fifth Amendment, reminding us that it is " 'a fundamental *trial* right' " that reflects " 'principles of humanity and civil liberty' "; that it was secured " 'after years of struggle' "; and that it does not serve "some value necessarily divorced from the correct ascertainment of guilt." *Ante,* at 691–692 (quoting *United States* v. *Verdugo-Urquidez,* 494 U. S. 259, 364 (1990), and *Bram* v. *United States,* 168 U. S. 532, 544 (1897)). The Court's spirited defense of the Fifth Amendment is, of course, entirely beside the point. The question is not whether *true* Fifth Amendment claims—the extraction and use of *compelled* testimony—should be cognizable on habeas. It is whether violations of *Miranda*'s prophylactic rule, which excludes from trial voluntary confessions obtained without the benefit of *Miranda*'s now-familiar warnings, should be. The questions are not the same; nor are their answers.

To say that the Fifth Amendment is a " 'fundamental *trial* right,' " *ante,* at 691 (quoting *United States* v. *Verdugo-Urquidez, supra,* at 264), is thus both correct and irrelevant. *Miranda*'s warning requirement may bear many labels, but "fundamental trial right" is not among them. Long before

Miranda was decided, it was well established that the Fifth Amendment prohibited the introduction of compelled or involuntary confessions at trial. And long before *Miranda*, the courts enforced that prohibition by asking a simple and direct question: Was "the confession the product of an essentially free and unconstrained choice," or was the defendant's will "overborne"? *Schneckloth* v. *Bustamonte*, 412 U. S., at 225 (quoting *Culombe* v. *Connecticut*, 367 U. S. 568, 602 (1961)); see *ante*, at 688–689; see, *e. g.*, *Bram* v. *United States*, *supra*. *Miranda*'s innovation was its introduction of the warning requirement: It commanded the police to issue warnings (or establish other procedural safeguards) before obtaining a statement through custodial interrogation. And it backed that prophylactic rule with a similarly prophylactic remedy—the requirement that unwarned custodial statements, even if wholly voluntary, be excluded at trial. *Miranda*, 384 U. S., at 444. Excluding violations of *Miranda*'s prophylactic suppression requirement from habeas would not leave true Fifth Amendment violations unredressed. Prisoners still would be able to seek relief by "invok[ing] a substantive test of voluntariness" or demonstrating prohibited coercion directly. *Johnson*, 384 U. S., at 730; *Elstad*, 470 U. S., at 307–308 (statements falling outside *Miranda*'s sweep analyzed under voluntariness standard). The Court concedes as much. *Ante*, at 693 ("[E]liminating habeas review of *Miranda* issues would not prevent a state prisoner from simply converting his barred *Miranda* claim into a due process claim that his conviction rested on an involuntary confession").

Excluding *Miranda* claims from habeas, then, denies collateral relief only in those cases in which the prisoner's statement was neither compelled nor involuntary but merely obtained without the benefit of *Miranda*'s prophylactic warnings. The availability of a suppression remedy in such cases cannot be labeled a "fundamental trial right," for there is no constitutional right to the suppression of *voluntary* statements. Quite the opposite: The Fifth Amendment, by its terms, prohibits only *compelled* self-incrimination; it makes no mention of "unwarned" statements. U. S. Const., Amdt. 5 ("No person . . . shall be *compelled* in any criminal case to be a witness against himself" (emphasis added)). On that much, our cases could not be clearer. See, *e. g., Michigan* v. *Tucker,* 417 U. S., at 448 ("Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself"); see *Elstad, supra,* at 306–307; *New York* v. *Quarles,* 467 U. S., at 654–655, and n. 5. As a result, the failure to issue warnings does "not abridge [the] constitutional privilege against compulsory self-incrimination, but depart[s] only from the prophylactic standards later laid down by this Court in *Miranda.*" *Tucker, supra,* at 446. If the principles of federalism, finality, and fairness ever counsel in favor of withholding relief on habeas, surely they do so where there is no constitutional harm to remedy.

Similarly unpersuasive is the Court's related argument, *ante,* at 692, that the Fifth Amendment trial right is not "necessarily divorced" from the interest of reliability. Whatever the Fifth Amendment's relationship to reliability, *Miranda*'s prophylactic rule is not merely "divorced" from the quest for truth but at war with it as well. The absence of *Miranda* warnings does not by some mysterious alchemy convert a voluntary and trustworthy statement into an involuntary and unreliable one. To suggest otherwise is both unrealistic and contrary to precedent. As I explained above, we have held over and over again that the exclusion of unwarned but voluntary statements not only fails to advance the cause of accuracy but impedes it by depriving the jury of trustworthy evidence. *Supra,* at 703. In fact, we have determined that the damage *Miranda* does to the truth-seeking mission of the criminal trial can become intolerable. We therefore have limited the extent of the suppression remedy, see *Harris* v. *New York*, 401 U. S. 222, 224–226 (1971) (unwarned but voluntary statement may be used for impeachment), and dispensed with it entirely elsewhere, see *Quarles, supra* (unwarned statement may be used for any purpose where statement was obtained under exigent circumstances bearing on public safety). And at least one Member of this Court dissented from *Miranda* itself because it "establish[ed] a new . . . barrier to the ascertainment of truth by the judicial process." *Miranda, supra,* at 542 (opinion of WHITE, J.). Consequently, I agree with the Court that *Miranda*'s relationship to accurate verdicts is an important consideration when deciding whether to permit *Miranda* claims on habeas. But it is a consideration that weighs decisively *against* the Court's decision today.

The consideration the Court identifies as being "most importan[t]" of all, *ante*, at 693, is an entirely pragmatic one. Specifically, the Court "project[s]" that excluding *Miranda* questions from habeas will not significantly promote efficiency or federalism because some *Miranda* issues are relevant to a statement's voluntariness. *Ante*, at 693–695. It is true that barring *Miranda* claims from habeas poses no barrier to the adjudication of voluntariness questions. But that does not make it "reasonable to suppose that virtually all *Miranda* claims [will] simply be recast" and litigated as voluntariness claims. *Ante*, at 693. Involuntariness requires coercive state action, such as trickery, psychological pressure, or mistreatment. *Colorado* v. *Connelly*, 479 U. S. 157, 167 (1986) ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' "); *ante*, at 693 (referring to "the crucial element of police coercion"). A *Miranda* claim, by contrast, requires no evidence of police overreaching whatsoever; it is enough that law enforcement officers commit a technical error. Even the forgetful failure to issue warnings to the most wary, knowledgeable, and seasoned of criminals will do. *Miranda,* 384 U. S., at 468 ("[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given"). Given the Court's unqualified trust in the willingness of police officers to satisfy *Miranda*'s requirements, *ante,* at 695, its suggestion that their every failure to do so involves coercion seems to me ironic. If the police have truly grown in "constitutional . . . sophistication," *ibid.,* then certainly it is reasonable to suppose that most technical errors in the administration of *Miranda*'s warnings are just that.

In any event, I see no need to resort to supposition. The published decisions of the lower federal courts show that what the Court assumes to be true demonstrably is not. In case after case, the courts are asked on habeas to decide purely technical *Miranda* questions that contain not even a hint of police overreaching. And in case after case, no voluntariness issue is raised, primarily because none exists. Whether the suspect was in "custody,"[1] whether or not there edy, see *Harris* v. *New York*, 401 U. S. 222, 224–226 (1971) (unwarned but voluntary statement may be used for impeachment), and dispensed with it entirely elsewhere, see *Quarles, supra* (unwarned statement may be used for any purpose where statement was obtained under exigent circumstances bearing on public safety). And at least one Member of this Court dissented from *Miranda* itself because it "establish[ed] a new . . . barrier to the ascertainment of truth by the judicial process." *Miranda, supra,* at 542 (opinion of WHITE, J.). Consequently, I agree with the Court that *Miranda*'s relationship to accurate verdicts is an important consideration when deciding whether to permit *Miranda* claims on habeas. But it is a consideration that weighs decisively *against* the Court's decision today.

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[1] See, *e. g., Schiro* v. *Clark,* 963 F. 2d 962, 974–975 (CA7 1992) (defendant approached officer in halfway house and asked to speak to him; not in custody); *Tart* v. *Massachusetts,* 949 F. 2d 490, 504 (CA1 1991) (fisherman asked to produce document on board his own, docked boat; no custody); *Williams* v. *Chrans,* 945 F. 2d 926, 950–952 (CA7 1991) (voluntary appearance for presentence report interview; not in custody), cert. denied, 505 U. S. 1208 (1992); *Carlson* v. *State,* 945 F. 2d 1026, 1028–1029 (CA8 1991) (suspect questioned at his home; no custody); *Davis* v. *Kemp,* 829 F. 2d 1522, 1535 (CA11 1987) (defendant voluntarily went to police station in absence of evidence that there was probable cause for arrest; not in custody), cert. denied, 485 U. S. 929 (1988); *Cobb* v. *Perini,* 832 F. 2d 342, 345–347 (CA6 1987) (investigatory *Terry*-stop; not in custody), cert. denied, 486 U. S. 1024 (1988); *Leviston* v. *Black,* 843 F. 2d 302, 304 (CA8) (in-jail interview initiated by incarcerated defendant; no custody), cert. denied, 488 U. S. 865 (1988); *Cordoba* v. *Hanrahan,* 910 F. 2d 691, 693–694 (CA10) (drunk driver questioned at accident scene before arrest; not in custody), cert. denied, 498 U. S. 1014 (1990).

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[1] See, *e. g., Schiro* v. *Clark*, 963 F. 2d 962, 974–975 (CA7 1992) (defendant approached officer in halfway house and asked to speak to him; not in custody); *Tart* v. *Massachusetts*, 949 F. 2d 490, 504 (CA1 1991) (fisherman asked to produce document on board his own, docked boat; no custody); *Williams* v. *Chrans*, 945 F. 2d 926, 950–952 (CA7 1991) (voluntary appearance for presentence report interview; not in custody), cert. denied, 505 U. S. 1208 (1992); *Carlson* v. *State*, 945 F. 2d 1026, 1028–1029 (CA8 1991) (suspect questioned at his home; no custody); *Davis* v. *Kemp*, 829 F. 2d 1522, 1535 (CA11 1987) (defendant voluntarily went to police station in absence of evidence that there was probable cause for arrest; not in custody), cert. denied, 485 U. S. 929 (1988); *Cobb* v. *Perini*, 832 F. 2d 342, 345–347 (CA6 1987) (investigatory *Terry*-stop; not in custody), cert. denied, 486 U. S. 1024 (1988); *Leviston* v. *Black*, 843 F. 2d 302, 304 (CA8) (in-jail interview initiated by incarcerated defendant; no custody), cert. denied, 488 U. S. 865 (1988); *Cordoba* v. *Hanrahan*, 910 F. 2d 691, 693–694 (CA10) (drunk driver questioned at accident scene before arrest; not in custody), cert. denied, 498 U. S. 1014 (1990).

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[2] See, *e. g., Endress* v. *Dugger*, 880 F. 2d 1244, 1246–1250 (CA11 1989) (defendant volunteered information without questioning), cert. denied, 495 U. S. 904 (1990); *United States ex rel. Church* v. *De Robertis*, 771 F. 2d 1015, 1018–1020 (CA7 1985) (placing defendant's brother in cell with him not interrogation); *Harryman* v. *Estelle*, 616 F. 2d 870, 873–875 (CA5) (en banc) (officer's surprised exclamation, "What is this?" upon finding condom filled with white powder, constituted interrogation), cert. denied, 449 U. S. 860 (1980); *Phillips* v. *Attorney General of California*, 594 F. 2d 1288, 1290–1291 (CA9 1979) (defendant volunteered information after officer stated that he wished to see interior of defendant's plane).

[3] See, *e. g., Chambers* v. *Lockhart*, 872 F. 2d 274, 275–276 (CA8) (omission of right to free appointed counsel), cert. denied, 493 U. S. 938 (1989); *Gates* v. *Zant*, 863 F. 2d 1492, 1500–1501 (CA11) (no warning that videotape of confession could be used), cert. denied, 493 U. S. 945 (1989); *Crespo* v. *Armontrout*, 818 F. 2d 684, 685–686 (CA8) (when and whether warnings were given), cert. denied, 484 U. S. 978 (1987); *De La Rosa* v. *Texas*, 743 F. 2d 299, 301–302 (CA5 1984) (officer's explanation of the warnings alleged to be misleading), cert. denied, 470 U. S. 1065 (1985); *Stanley* v. *Zant*, 697 F. 2d 955, 972 (CA11 1983) (allegedly misleading waiver form), cert. denied, 467 U. S. 1219 (1984).

[4] See, *e. g., Bobo* v. *Kolb*, 969 F. 2d 391, 395–398 (CA7 1992) (standing mute); *Christopher* v. *Florida*, 824 F. 2d 836, 841–843 (CA11 1987) (equivocal invocation of right to silence), cert. denied, 484 U. S. 1077–1078 (1988); *Lightbourne* v. *Dugger*, 829 F. 2d 1012, 1017–1019 (CA11 1987) (spontaneous resumption of discussion after cutting off questioning), cert. denied, 488 U. S. 934 (1988).

[5] See, *e. g., Terrovona* v. *Kincheloe*, 912 F. 2d 1176, 1179–1180 (CA9 1990) (validity of implied waiver in light of defendant's "background, experience, and conduct"), cert. denied, 499 U. S. 979 (1991); *Fike* v. *James*, 833 F. 2d 1503, 1506–1507 (CA11 1987) (defendant's initiation of contact waived previous invocation of rights).

Even assuming that many *Miranda* claims could "simply be recast" as voluntariness claims, it does not follow that barring *Miranda*'s prophylactic rule from habeas would unduly complicate their resolution. The Court labels *Miranda* a "bright-line (or, at least, brighter-line) rul[e]" and involuntariness an "exhaustive totality-of-circumstances approach," *ante*, at 694, but surely those labels overstate the differences. *Miranda*, for all its alleged brightness, is not without its difficulties; and voluntariness is not without its strengths. JUSTICE WHITE so observed in his *Miranda* dissent, noting that the Court could not claim that

> "judicial time and effort . . . will be conserved because of the ease of application of the *[Miranda]* rule. *[Miranda]* leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, . . . all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution." *Miranda*, *supra*, at 544–545.

Experience has proved JUSTICE WHITE's prediction correct. *Miranda* creates as many close questions as it resolves. The task of determining whether a defendant is in "custody" has proved to be "a slippery one." *Elstad*, 470 U. S., at 309; see, *e. g.*, n. 1, *supra* (custody cases). And the supposedly "bright" lines that separate interrogation from spontaneous declaration, the exercise of a right from waiver, and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill defined. See *Rhode Island* v. *Innis*, 446 U. S. 291 (1980) (interrogation); n. 2, *supra* (interrogation); nn. 4 and 5, *supra* (waiver and invocation); n. 3, *supra* (adequacy of warnings). Yet *Miranda* requires those lines to be drawn with precision in each case.

The totality-of-the-circumstances approach, on the other hand, permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous. Thus, it is true that the existence of warnings is still a consideration under the totality-of-the-circumstances approach, *ante,* at 693–694, but it is unnecessary to determine conclusively whether "custody" existed and triggered the warning requirement, or whether the warnings given were sufficient. It is enough that the habeas court look to the warnings or their absence, along with all other factors, and consider them in deciding what is, after all, the ultimate question: whether the confession was compelled and involuntary or the product of a free and unimpaired will. See *Schneckloth* v. *Bustamonte,* 412 U. S., at 225–226.

Nor does continued application of *Miranda*'s prophylactic rule on habeas dispense with the necessity of testing confessions for voluntariness. While *Miranda*'s conclusive presumption of coercion may sound like an impenetrable barrier to the introduction of compelled testimony, in practice it leaks like a sieve. *Miranda,* for example, does not preclude the use of an unwarned confession outside the prosecution's case in chief, *Harris* v. *New York,* 401 U. S. 222 (1971); *Oregon* v. *Hass,* 420 U. S. 714 (1975); involuntary statements, by contrast, must be excluded from trial for all purposes, *Mincey* v. *Arizona,* 437 U. S. 385, 398 (1978). *Miranda* does not preclude admission of the fruits of an unwarned statement, see *Oregon* v. *Elstad, supra;* but under the Fifth and Fourteenth Amendments, we require the suppression of not only compelled confessions but tainted subsequent confessions as well, *Clewis* v. *Texas,* 386 U. S. 707, 710 (1967). Finally, *Miranda* can fail to exclude some truly involuntary statements: It is entirely possible to extract a compelled statement despite the most precise and accurate of warnings.

See *Johnson*, 384 U. S., at 730 (warnings are only one factor in determining voluntariness).

The Court's final rationale is that, because the federal courts rarely issue writs for *Miranda* violations, eliminating *Miranda* claims from *habeas* will not decrease state-federal tensions to an appreciable degree. *Ante*, at 694–695. The relative infrequency of relief, however, does not diminish the intrusion on state sovereignty; it diminishes only our justification for intruding in the first place. After all, even if relief is denied at the end of the day, the State still must divert its scarce prosecutorial resources to defend an otherwise final conviction. If relief is truly rare, efficiency counsels in favor of dispensing with the search for the prophylactic rule violation in a haystack; instead, the federal courts should concentrate on the search for true Fifth Amendment violations by adjudicating the questions of voluntariness and compulsion directly. I therefore find it of little moment that the Police Foundation et al. support respondent. *Ante*, at 695, n. 6. Those who bear the primary burden of defending state convictions in federal courts—including 36 States and the National District Attorneys Association— resoundingly support the opposite side. See Brief for California et al. as *Amici Curiae;* Brief for Americans for Effective Law Enforcement, Inc., and the National District Attorneys Association, Inc., as *Amici Curiae;* see also Brief for United States as *Amicus Curiae* (United States must defend against claims raised by federal prisoners under 28 U. S. C. § 2255).

The Court's response, that perhaps the police respect the *Miranda* rule as a result of "the existence of [habeas] review," *ante*, at 695, is contrary to both case law and common sense. As explained above, there is simply no reason to think that habeas relief, which often " 'strike[s] like lightning' " years after conviction, contributes much additional deterrence beyond the threat of exclusion during state proceedings. See *supra*, at 704 (quoting *Duckworth*, 492 U. S., at 211 (O'CONNOR, J., concurring)). Accord, Friendly, 38

U. Chi. L. Rev., at 163. And our decision in *Stone* expressly so held: "The view that the deterrence . . . would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws . . . that went undetected at trial and on appeal." 428 U. S., at 493 (footnote omitted). The majority offers no justification for disregarding our decision in *Stone;* nor does it provide any reason to question the truth of *Stone*'s observation.

IV

As the Court emphasizes today, *Miranda*'s prophylactic rule is now 27 years old; the police and the state courts have indeed grown accustomed to it. *Ante,* at 695. But it is precisely because the rule is well accepted that there is little further benefit to enforcing it on habeas. We can depend on law enforcement officials to administer warnings in the first instance and the state courts to provide a remedy when law enforcement officers err. None of the Court's asserted justifications for enforcing *Miranda*'s prophylactic rule through habeas—neither reverence for the Fifth Amendment nor the concerns of reliability, efficiency, and federalism—counsel in favor of the Court's chosen course. Indeed, in my view they cut in precisely the opposite direction. The Court may reconsider its decision when presented with empirical data. See *ante,* at 693 (noting absence of empirical data); *ante,* at 688 (holding only that today's *argument* in favor of extending *Stone* "falls short"). But I see little reason for such a costly delay. Logic and experience are at our disposal now. And they amply demonstrate that applying *Miranda*'s prophylactic rule on habeas does not increase the amount of justice dispensed; it only increases the frequency with which the admittedly guilty go free. In my view, *Miranda* imposes such grave costs and produces so little benefit on habeas that its continued application is neither tolerable nor justified. Accordingly, I join Part III of the Court's opinion but respectfully dissent from the remainder.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and dissenting in part.

The issue in this case—whether the extraordinary remedy of federal habeas corpus should routinely be available for claimed violations of *Miranda* rights—involves not *jurisdiction* to issue the writ, but the *equity* of doing so. In my view, both the Court and JUSTICE O'CONNOR disregard the most powerful equitable consideration: that Williams has already had full and fair opportunity to litigate this claim. He had the opportunity to raise it in the Michigan trial court; he did so and lost. He had the opportunity to seek review of the trial court's judgment in the Michigan Court of Appeals; he did so and lost. Finally, he had the opportunity to seek discretionary review of that Court of Appeals judgment in both the Michigan Supreme Court and this Court; he did so and review was denied. The question at this stage is whether, given all that, a federal habeas court should now reopen the issue and adjudicate the *Miranda* claim anew. The answer seems to me obvious: it should not. That would be the course followed by a federal habeas court reviewing a *federal* conviction; it mocks our federal system to accord state convictions less respect.

I

By statute, a federal habeas court has jurisdiction over any claim that a prisoner is "in custody in violation of the Constitution or laws" of the United States. See 28 U. S. C. §§2241(c)(3), 2254(a), 2255. While that jurisdiction does require a claim of legal error in the original proceedings, cf. *Herrera* v. *Collins*, 506 U. S. 390 (1993), it is otherwise sweeping in its breadth. As early as 1868, this Court described it in these terms:

> "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitu-

> tion, treaties, or laws. It is impossible to widen this jurisdiction." *Ex parte McCardle,* 6 Wall. 318, 325–326 (1868).

Our later case law has confirmed that assessment. Habeas jurisdiction extends, we have held, to federal claims for which an opportunity for full and fair litigation has already been provided in state or federal court, see *Brown* v. *Allen,* 344 U. S. 443, 458–459 (1953); *Kaufman* v. *United States,* 394 U. S. 217, 223–224 (1969), to procedurally defaulted federal claims, including those over which this Court would have no jurisdiction on direct review, see *Fay* v. *Noia,* 372 U. S. 391, 426, 428–429 (1963); *Kaufman, supra,* at 223; *Wainwright* v. *Sykes,* 433 U. S. 72, 90–91 (1977); *Coleman* v. *Thompson,* 501 U. S. 722, 750 (1991), and to federal claims of a state criminal defendant awaiting trial, see *Ex parte Royall,* 117 U. S. 241, 251 (1886).

But with great power comes great responsibility. Habeas jurisdiction is tempered by the restraints that accompany the exercise of equitable discretion. This is evident from the text of the federal habeas statute, which provides that writs of habeas corpus "*may* be granted"—not that they *shall* be granted—and enjoins the court to "dispose of the matter as law *and justice* require." 28 U. S. C. §§ 2241(a), 2243 (emphases added). That acknowledgment of discretion is merely the continuation of a long historic tradition. In English law, habeas corpus was one of the so-called "prerogative" writs, which included the writs of mandamus, certiorari, and prohibition. Duker, The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame, 53 N. Y. U. L. Rev. 983, 984, n. 2 (1978); 3 W. Blackstone, Commentaries 132 (1768). "[A]s in the case of all other prerogative writs," habeas would not issue "as of mere course," but rather required a showing "why the extraordinary power of the crown is called in to the party's assistance." *Ibid.* And even where the writ was issued to compel production of the prisoner in court, the standard applied to determine whether relief would be accorded was equitable: The court was to "determine whether the case of [the prisoner's] commitment be just, and thereupon do as to justice shall appertain." 1 *id.*, at 131.

This Court has frequently rested its habeas decisions on equitable principles. In one of the earliest federal habeas cases, *Ex parte Watkins*, 3 Pet. 193, 201 (1830), Chief Justice Marshall wrote: "No doubt exists respecting the power [of the Court to issue the writ]; the question is, whether this be a case in which it ought to be exercised." And in *Ex parte Royall*, the Court, while affirming that a federal habeas court had "the power" to discharge a state prisoner awaiting trial, held that it was "not bound in every case to exercise such a power." 117 U. S., at 251. The federal habeas statute did "not deprive the court of discretion," which "should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States." *Ibid.*

This doctrine continues to be reflected in our modern cases. In declining to extend habeas relief to all cases of state procedural default, the Court in *Fay* v. *Noia* said: "Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule." 372 U. S., at 438. See also *Wainwright* v. *Sykes*, *supra*, at 88. In fashioning this Court's retroactivity doctrine, the plurality in *Teague* v. *Lane*, 489 U. S. 288, 308–310 (1989), also relied on equitable considerations. And in a case announced today, holding that the harmless-error standard for habeas corpus is less onerous than the one for direct review, the Court carries on this tradition by expressly considering equitable principles such as "finality," "comity," and "federalism." *Brecht* v. *Abrahamson*, *ante*, at 635–636.

Indeed, as JUSTICE O'CONNOR notes, this Court's jurisprudence has defined the scope of habeas corpus largely by means of such equitable principles. See *ante,* at 698–700 (opinion concurring in part and dissenting in part). The use of these principles, which serve as "gateway[s]" through which a habeas petitioner must pass before proceeding to the merits of a constitutional claim, "is grounded in the 'equitable discretion' of habeas courts." *Herrera* v. *Collins, supra,* at 404.

II

As the Court today acknowledges, see *ante,* at 686–687, the rule of *Stone* v. *Powell,* 428 U. S. 465 (1976), is simply one application of equitable discretion. It does not deny a federal habeas court jurisdiction over Fourth Amendment claims, but merely holds that the court ought not to entertain them when the petitioner has already had an opportunity to litigate them fully and fairly. See *id.,* at 495, n. 37. It is therefore not correct to say that applying *Stone* to the present case involves "eliminating review of *Miranda* claims" from federal habeas, *ante,* at 693, or that the Court is being "asked to exclude a substantive category of issues from relitigation on habeas," *ante,* at 700 (O'CONNOR, J., concurring in part and dissenting in part). And it is therefore unnecessary to discuss at length the value of *Miranda* rights, as though it has been proposed that since they are particularly worthless they deserve specially disfavored treatment. The proposed rule would treat *Miranda* claims no differently from *all other claims,* taking account of all equitable factors, including the opportunity for full and fair litigation, in determining whether to provide habeas review. Wherein *Miranda* and Fourth Amendment claims differ from some other claims, is that the most significant countervailing equitable factor (possibility that the assigned error produced the conviction of an innocent person) will ordinarily not exist.

At common law, the opportunity for full and fair litigation of an issue at trial and (if available) direct appeal was not only *a* factor weighing against reaching the merits of an issue on habeas; it was a *conclusive* factor, unless the issue was a legal issue going to the jurisdiction of the trial court. See *Ex parte Watkins, supra,* at 202–203; W. Church, Habeas Corpus § 363 (1884). Beginning in the late 19th century, however, that rule was gradually relaxed, by the device of holding that various illegalities deprived the trial court of jurisdiction. See, *e. g., Ex parte Lange,* 18 Wall. 163, 176 (1874) (no jurisdiction to impose second sentence in violation of Double Jeopardy Clause); *Ex parte Siebold,* 100 U. S. 371, 376–377 (1880) (no jurisdiction to try defendant for violation of unconstitutional statute); *Frank* v. *Mangum,* 237 U. S. 309 (1915) (no jurisdiction to conduct trial in atmosphere of mob domination); *Moore* v. *Dempsey,* 261 U. S. 86 (1923) (same); *Johnson* v. *Zerbst,* 304 U. S. 458, 468 (1938) (no jurisdiction to conduct trial that violated defendant's Sixth Amendment right to counsel). See generally *Wright* v. *West,* 505 U. S. 277, 285–286 (1992) (opinion of THOMAS, J.); *Fay, supra,* at 450–451 (Harlan, J., dissenting). Finally, the jurisdictional line was openly abandoned in *Waley* v. *Johnston,* 316 U. S. 101, 104–105 (1942). See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1502 (3d ed. 1988) (hereinafter Hart and Wechsler).

But to say that prior opportunity for full and fair litigation no longer *automatically* precludes from consideration even nonjurisdictional issues is not to say that such prior opportunity is no longer a relevant equitable factor. Reason would suggest that it must be, and *Stone* v. *Powell, supra,* establishes that it is. Thus, the question before us is not whether a holding unique to Fourth Amendment claims (and resting upon nothing more principled than our estimation that Fourth Amendment exclusion claims are not very important) should be expanded to some other arbitrary category beyond that; but rather, whether the general principle that is the only valid justification for *Stone* v. *Powell* should for some reason *not* be applied to *Miranda* claims. I think the answer to that question is clear: Prior opportunity to litigate an issue should be an important equitable consideration in *any* habeas case, and should ordinarily preclude the court from reaching the merits of a claim, unless it goes to the fairness of the trial process or to the accuracy of the ultimate result.

Our case law since *Stone* is entirely consistent with this view. As the Court notes, *ante,* at 687–688, we have held that the rule in *Stone* does not apply in three cases. *Kimmelman* v. *Morrison,* 477 U. S. 365 (1986), involved alleged denial of the Sixth Amendment right to counsel, which unquestionably goes to the fairness of the trial process. *Rose* v. *Mitchell,* 443 U. S. 545 (1979), involved alleged discrimination by the trial court in violation of the Fourteenth Amendment. We concluded that since the "same trial court will be the court that initially must decide the merits of such a claim," and since the claim involved an assertion that "the state judiciary itself has purposely violated the Equal Protection Clause," no opportunity for a full and fair state hearing existed. *Id.,* at 561; see also *id.,* at 563. And *Jackson* v. *Virginia,* 443 U. S. 307 (1979), involved a claim that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt," *id.,* at 324, which is obviously a direct challenge to the accuracy of the ultimate result.

III

The rule described above—or indeed a rule even somewhat more limiting of habeas review than that—is followed in federal postconviction review of *federal* convictions under 28 U. S. C. § 2255. In *Kaufman* v. *United States,* 394 U. S. 217 (1969), which held that res judicata does not bar § 2255 habeas review of constitutional issues, we stated that a district court had "discretion" to refuse to reach the merits of a constitutional claim that had already been raised and resolved against the prisoner at trial and on direct review.

Id., at 227, n. 8. Since *Kaufman*, federal courts have uniformly held that, absent countervailing considerations, district courts may refuse to reach the merits of a constitutional claim previously raised and rejected on direct appeal. See, *e. g.*, *Giacalone* v. *United States*, 739 F. 2d 40, 42–43 (CA2 1984); *United States* v. *Orejuela*, 639 F. 2d 1055, 1057 (CA3 1981); *Stephan* v. *United States*, 496 F. 2d 527, 528–529 (CA6 1974), cert. denied *sub nom. Marchesani* v. *United States*, 423 U. S. 861 (1975); see also 3 C. Wright, Federal Practice and Procedure § 593, p. 439, n. 26 (1982); Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1064–1066 (1970). Thus, a prior opportunity for full and fair litigation is normally dispositive of a federal prisoner's habeas claim. If the claim was raised and rejected on direct review, the habeas court will not readjudicate it absent countervailing equitable considerations; if the claim was not raised, it is procedurally defaulted and the habeas court will not adjudicate it absent countervailing equitable considerations (*e. g.*, actual innocence or cause and prejudice, see *United States* v. *Frady*, 456 U. S. 152 (1982)).

Because lower federal courts have not generally recognized their discretion to deny habeas relief in state cases where opportunity for full and fair litigation was accorded, the peculiar state of current federal habeas practice is this: State courts routinely see their criminal convictions vacated by federal district judges, but federal courts see their criminal convictions afforded a substantial measure of finality and respect. See Hart and Wechsler 1585. Only one theory can possibly justify this disparity—the theory advanced in *Fay* v. *Noia*, that a federal forum must be afforded for every federal claim of a state criminal defendant.* See 372 U. S., at

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*Of course a federal forum is theoretically available in this Court, by writ of certiorari. Quite obviously, however, this mode of review cannot be generally applied due to practical limitations. See *Stone* v. *Powell*, 428 U. S. 465, 526 (1976) (Brennan, J., dissenting).

418. In my view, that theory is profoundly wrong for several reasons.

First, it has its origin in a misreading of our early precedents. *Fay* interpreted the holding of *Ex parte Royall*—that federal courts had discretion not to entertain the habeas claims of state prisoners prior to the conclusion of state-court proceedings—as containing the implication that *after* conclusion of those proceedings there would be plenary federal review of *all* constitutional claims. 372 U. S., at 420. In fact, however, *Royall* had noted and affirmed the common-law rule that claims of error not going to the jurisdiction of the convicting court could ordinarily be entertained only on writ of error, not on habeas corpus. 117 U. S., at 253. See *Fay, supra,* at 453–454 (Harlan, J., dissenting). See also *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 255 (1973) (Powell, J., concurring). *Royall* contained no hint of a suggestion that a federal habeas court should afford state-court judgments less respect than federal-court judgments. To the contrary, it maintained the traditional view that federal and state courts have equal responsibility for the protection of federal constitutional rights. The discretion of the federal habeas court "should be exercised," it said, "in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, . . . courts equally bound to guard and protect rights secured by the Constitution." 117 U. S., at 251. And in describing the proper disposition of a federal habeas petition filed after state conviction, *Royall* cited *Ex parte Lange,* 18 Wall. 163 (1874), which involved a federal habeas attack on a *federal* conviction. See 117 U. S., at 253. Thus, *Royall* is properly understood as saying that the federal habeas statute guaranteed state prisoners, not a federal forum for all their federal claims, but rather the same rights to federal habeas relief that federal prisoners possessed.

Worse than misreading case precedent, however, the federal right/federal forum theory misperceives the basic structure of our national system. That structure establishes this Court as the supreme judicial interpreter of the Federal Constitution and laws, but gives other federal courts no higher or more respected a role than state courts in applying that "Law of the Land"—which it says all state courts are bound by, and all state judges must be sworn to uphold. U. S. Const., Art. VI. See *Robb* v. *Connolly,* 111 U. S. 624, 637 (1884); *Ex parte Royall, supra,* at 251; *Brown,* 344 U. S., at 499 (opinion of Frankfurter, J.). It would be a strange constitution that regards state courts as second-rate instruments for the vindication of federal rights and yet makes no mandatory provision for lower federal courts (as our Constitution does not). And it would be an unworkable constitution that requires redetermination in federal courts of all issues of pervasive federal constitutional law that arise in state-court litigation.

Absent indication to the contrary, state courts should be presumed to have applied federal law as faithfully as federal courts. See *Ex parte Royall, supra,* at 252; *Brecht* v. *Abrahamson, ante,* at 636. A federal court entertaining collateral attack against a state criminal conviction should accord the same measure of respect and finality as it would to a federal criminal conviction. As it exercises equitable discretion to determine whether the merits of constitutional claims will be reached in the one, it should exercise a similar discretion for the other. The distinction that has arisen in lower court practice is unsupported in law, utterly impractical and demeaning to the States in its consequences, and must be eliminated.

* * *

While I concur in Part III of the Court's opinion, I cannot agree with the rest of its analysis. I would reverse the judgment of the Court of Appeals and remand the case for a determination whether, given that respondent has already been afforded an opportunity for full and fair litigation in the courts of Michigan, any unusual equitable factors counsel in favor of readjudicating the merits of his *Miranda* claim on habeas corpus.

UNITED STATES *v.* OLANO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–1306. Argued December 9, 1992—Decided April 26, 1993

Two of the fourteen jurors selected to hear evidence in respondents' criminal trial were identified as alternates before jury deliberations began. The District Court, without objection from respondents, permitted the alternates to attend the deliberations, instructing them that they should not participate, and respondents were convicted on a number of charges. The Court of Appeals vacated respondents' convictions. It concluded, *inter alia,* that the alternates' presence during deliberations violated Federal Rule of Criminal Procedure 24(c), which requires that alternate jurors be discharged after the jury retires to consider its verdict. The court found that the alternates' presence in violation of Rule 24(c) was inherently prejudicial and reversible *per se* under the "plain error" standard of Rule 52(b).

Held: The presence of the alternate jurors during jury deliberations was not an error that the Court of Appeals was authorized to correct under Rule 52(b). Pp. 731–741.

(a) A court of appeals has discretion under Rule 52(b) to correct "plain errors or defects affecting substantial rights" that were forfeited because not timely raised in the district court, which it should exercise only if the errors "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson,* 297 U. S. 157, 160. There are three limitations on appellate authority under Rule 52(b). First, there must be an "error." A deviation from a legal rule during the district court proceedings is an error unless the defendant has waived the rule. Mere forfeiture does not extinguish an error. Second, the error must be "plain," a term synonymous with "clear" or, equivalently, "obvious." Third, the plain error must "affec[t] substantial rights," which normally means that the error must be prejudicial, affecting the outcome of the district court proceedings. Normally a court of appeals engages in a specific analysis of the district court's record to determine prejudice, and the defendant bears the burden of persuasion. This Court need not decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial" or whether there are errors that should be presumed prejudicial. Pp. 731–735.

(b) The language of Rule 52(b), the nature of forfeiture, and the established appellate practice that Congress intended to continue, all point to the conclusion that the Rule is permissive, not mandatory. The standard that should guide the exercise of remedial discretion was articulated in *United States* v. *Atkinson, supra,* at 160. The remedy is not limited to cases of actual innocence, since an error may "seriously affect the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence. However, a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by Rule 52(b) would be illusory. Pp. 735–737.

(c) The Government concedes that the deviation from Rule 24(c) in this case was an "error" that was "plain." However, that deviation did not "affec[t] substantial rights." The presence of alternates during jury deliberations is the type of error that must be analyzed for prejudicial impact. While their presence contravened the cardinal principle that jury deliberations shall remain private and secret, the purpose of such privacy is to protect deliberations from improper influence. Whether a presumption of prejudice is imposed or a specific analysis is made does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict? See, *e. g., Parker* v. *Gladden,* 385 U. S. 363 *(per curiam).* Respondents have made no specific showing that the alternates either participated in, or "chilled," the jury's deliberations. Nor can prejudice be presumed. The Court of Appeals erred in presuming that the alternates failed to follow the judge's instructions, see *Richardson* v. *Marsh,* 481 U. S. 200, 206, and the alternates' mere presence did not entail a sufficient risk of "chill" to justify a presumption of prejudice on that score. Since the error was not prejudicial, there is no need to consider whether it would have warranted correction under the *Atkinson* standard. Pp. 737–741.

934 F. 2d 1425, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 741. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, *post,* p. 743.

Solicitor General Starr argued the cause for the United States. With him on the briefs were *Assistant Attorney General Mueller, Deputy Solicitor General Bryson, William K. Kelley,* and *Joel Gershowitz.*

Carter G. Phillips argued the cause for respondents and filed a brief for respondent Olano. *William J. Genego* and *Sheryl Gordon McCloud* filed a brief for respondent Gray.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question in this case is whether the presence of alternate jurors during jury deliberations was a "plain error" that the Court of Appeals was authorized to correct under Federal Rule of Criminal Procedure 52(b).

I

Each of the respondents, Guy W. Olano, Jr., and Raymond M. Gray, served on the board of directors of a savings and loan association. In 1986, the two were indicted in the Western District of Washington on multiple federal charges for their participation in an elaborate loan "kickback" scheme. Their joint jury trial with five other codefendants commenced in March 1987. All of the parties agreed that 14 jurors would be selected to hear the case, and that the 2 alternates would be identified before deliberations began.

On May 26, shortly before the end of the 3-month trial, the District Court suggested to the defendants that the two alternate jurors, soon to be identified, might be allowed to attend deliberations along with the regular jurors:

> ". . . I'd just like you to think about it, you have a day, let me know, it's just a suggestion and you can—if there is even one person who doesn't like it we won't do it, but it is a suggestion that other courts have followed in long cases where jurors have sat through a lot of testimony, and that is to let the alternates go in but not participate, but just to sit in on deliberations.
>
> "It's strictly a matter of courtesy and I know many judges have done it with no objections from counsel. One of the other things it does is if they don't participate but they're there, if an emergency comes up and people decide they'd rather go with a new alternate rather than 11, which the rules provide, it keeps that option open. It also keeps people from feeling they've sat here for three months and then get just kind of kicked out. But it's certainly not worth—unless it's something you all

> agree to, it's not worth your spending time hassling about, you know what I mean? You've got too much else on your mind. I don't want it to be a big issue; it's just a suggestion. Think about it and let me know." App. 79.

The matter arose again the next day, in an ambiguous exchange between Gray's counsel and the District Court:

> "THE COURT: [H]ave you given any more thought as to whether you want the alternates to go in and not participate, or do you want them out?
>
> "MR. ROBISON [counsel for Gray]: We would ask they not.
>
> "THE COURT: Not." App. 82.

One day later, on May 28, the last day of trial, the District Court for a third time asked the defendants whether they wanted the alternate jurors to retire into the jury room. Counsel for defendant Davy Hilling gave an unequivocal, affirmative answer.

> "THE COURT: Well, Counsel, I received your alternates. Do I understand that the defendants now—it's hard to keep up with you, Counsel. It's sort of a day by day—but that's all right. You do all agree that all fourteen deliberate?
>
> "Okay. Do you want me to instruct the two alternates not to participate in deliberation?
>
> "MR. KELLOGG [counsel for Hilling]: That's what I was on my feet to say. It's my understanding that the conversation was the two alternates go back there instructed that they are not to take part in any fashion in the deliberations." App. 86.

This discussion, like the preceding two, took place outside the hearing of the jurors. As before, both Gray's counsel and Olano's counsel were present. Gray, too, attended all three discussions. Olano may not have attended the third—

he claims that the Marshal failed to return him to the courtroom in time—but he was present at the first two.

The District Court concluded that Hilling's counsel was speaking for the other defendants as well as his own client. None of the other counsel intervened during the colloquy between the District Court and Hilling's counsel on May 28, nor did anyone object later the same day when the court instructed the jurors that the two alternates would be permitted to attend deliberations. The court instructed:

> "We have indicated to you that the parties would be selecting alternates at this time. I am going to inform you who those alternates are, but before I do, let me tell you, I think it was a difficult selection for all concerned, and since the law requires that there be a jury of twelve, it is only going to be a jury of twelve. But what we would like to do in this case is have all of you go back so that even the alternates can be there for the deliberations, but according to the law, the alternates must not participate in the deliberations. It's going to be hard, but if you are an alternate, we think you should be there because things do happen in the course of lengthy jury deliberations, and if you need to step in, we want you to be able to step in having heard the deliberations. But we are going to ask that you not participate.
>
> "The alternates are Norman Sargent and Shirley Kinsella. I am going to ask at this time now, ladies and gentlemen, that you retire to the jury room and begin your deliberations." App. 89–90.

During deliberations, one of the alternate jurors was excused at his request. The other alternate remained until the jury returned with its verdict.

Both respondents were convicted on a number of charges. They appealed to the United States Court of Appeals for the Ninth Circuit. 934 F. 2d 1425 (1991). The Court of Appeals reversed certain counts for insufficient evidence and then considered whether the presence of alternate jurors during jury deliberations violated Federal Rule of Criminal Procedure 24(c):

> "The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. . . . An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

Because respondents had not objected to the alternates' presence, the court applied a "plain error" standard under Rule 52(b). Noting that "[w]e have not previously directly resolved the question of the validity of a verdict when alternate jurors are permitted to be present during the jury's deliberations," the court relied on the "language of Rule 24(c), Rule 23(b), the Advisory Committee Notes to Rule 23, and related Ninth Circuit precedent" to hold that Rule 24(c) barred alternate jurors from attending jury deliberations unless the defendant, on the record, explicitly consented to their attendance. 934 F. 2d, at 1436–1437. The court found that Rule 24(c) was violated in the instant case, because "the district court did not obtain individual waivers from each defendant personally, either orally or in writing." *Id.*, at 1438. It then held that the presence of alternates in violation of Rule 24(c) was "inherently prejudicial" and reversible *per se. Ibid.*

> "We cannot fairly ascertain whether in a given case the alternate jurors followed the district court's prohibition on participation. However, even if they heeded the letter of the court's instructions and remained *orally* mute throughout, it is entirely possible that their attitudes, conveyed by facial expressions, gestures or the

> like, may have had some effect upon the decision of one or more jurors." *Ibid.* (internal quotation marks and brackets omitted).

Finally, in a footnote, the court decided that "[b]ecause the violation is inherently prejudicial and because it infringes upon a substantial right of the defendants, it falls within the plain error doctrine." *Id.*, at 1439, n. 23.

The Court of Appeals vacated respondents' remaining convictions and did not reach the other "substantial issues" that they had raised. *Id.*, at 1428, n. 3. We granted certiorari to clarify the standard for "plain error" review by the courts of appeals under Rule 52(b). 504 U. S. 908 (1992).

II

"No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U. S. 414, 444 (1944). Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court. The Rule has remained unchanged since the original version of the Criminal Rules, and was intended as "a restatement of existing law." Advisory Committee's Notes on Fed. Rule Crim. Proc. 52, 18 U. S. C. App., p. 833. It is paired, appropriately, with Rule 52(a), which governs nonforfeited errors. Rule 52 provides:

> "(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> "(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Although "[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice," *Hormel* v. *Helvering,* 312 U. S. 552, 557 (1941), the authority created by Rule 52(b) is circumscribed. There must be an "error" that is "plain" and that "affect[s] substantial rights." Moreover, Rule 52(b) leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young,* 470 U. S. 1, 15 (1985) (quoting *United States* v. *Atkinson,* 297 U. S. 157, 160 (1936)).

A

Rule 52(b) defines a single category of forfeited-but-reversible error. Although it is possible to read the Rule in the disjunctive, as creating two separate categories—"plain errors" and "defects affecting substantial rights"—that reading is surely wrong. See *Young,* 470 U. S., at 15, n. 12 (declining to adopt disjunctive reading). As we explained in *Young,* the phrase "error or defect" is more simply read as "error." *Ibid.* The forfeited error "may be noticed" only if it is "plain" and "affect[s] substantial rights." More precisely, a court of appeals may *correct* the error (either vacating for a new trial, or reversing outright) only if it meets these criteria. The appellate court must consider the error, putative or real, in deciding whether the judgment below should be overturned, but cannot provide that remedy unless Rule 52(b) applies (or unless some other provision authorizes the error's correction, an issue that respondents do not raise).

The first limitation on appellate authority under Rule 52(b) is that there indeed be an "error." Deviation from a legal rule is "error" unless the rule has been waived. For example, a defendant who knowingly and voluntarily pleads guilty in conformity with the requirements of Rule 11 cannot have his conviction vacated by a court of appeals on the ground that he ought to have had a trial. Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not "error."

Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938); see, *e. g., Freytag* v. *Commissioner,* 501 U. S. 868, 894, n. 2 (1991) (SCALIA, J., concurring in part and concurring in judgment) (distinguishing between "waiver" and "forfeiture"); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, 126 U. Pa. L. Rev. 473, 474–477 (1978) (same); Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214, 1214–1215 (1977) (same). Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. See, *e. g.,* 2 W. LaFave & J. Israel, Criminal Procedure § 11.6 (1984) (allocation of authority between defendant and counsel); Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Texas L. Rev. 193 (1977) (waivability and standards for waiver). Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). Although in theory it could be argued that "[i]f the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review," Orfield, The Scope of Appeal in Criminal Cases, 84 U. Pa. L. Rev. 825, 840 (1936), this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

The second limitation on appellate authority under Rule 52(b) is that the error be "plain." "Plain" is synonymous with "clear" or, equivalently, "obvious." See *Young, supra,* at 17, n. 14; *United States* v. *Frady,* 456 U. S. 152, 163 (1982). We need not consider the special case where the error was unclear at the time of trial but becomes clear on appeal because the applicable law has been clarified. At a minimum, a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law.

The third and final limitation on appellate authority under Rule 52(b) is that the plain error "affec[t] substantial rights." This is the same language employed in Rule 52(a), and in most cases it means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings. See, *e. g., Bank of Nova Scotia* v. *United States,* 487 U. S. 250, 255–257 (1988); *United States* v. *Lane,* 474 U. S. 438, 454–464 (1986) (Brennan, J., concurring in part and dissenting in part); *Kotteakos* v. *United States,* 328 U. S. 750, 758–765 (1946). When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called "harmless error" inquiry—to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial. See *Young, supra,* at 17, n. 14 ("[F]ederal courts have consistently interpreted the plain-error doctrine as requiring an appellate court to find that the claimed error . . . had [a] prejudicial impact on the jury's deliberations"). This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error "does *not* affect substantial rights" (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* "affec[t] substantial rights." See also Note, Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Reserved, 23 Miss. L. J. 42, 57 (1951) (summarizing existing law) ("The error must be real and such that it probably influenced the verdict . . .").

We need not decide whether the phrase "affecting substantial rights" is always synonymous with "prejudicial." See generally *Arizona* v. *Fulminante,* 499 U. S. 279, 310 (1991) (constitutional error may not be found harmless if error deprives defendant of the " 'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair' ") (quoting *Rose* v. *Clark,* 478 U. S. 570, 577–578 (1986)). There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome, but this issue need not be addressed. Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice. Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong of Rule 52(b).

B

Rule 52(b) is permissive, not mandatory. If the forfeited error is "plain" and "affect[s] substantial rights," the court of appeals has authority to order correction, but is not required to do so. The language of the Rule ("may be noticed"), the nature of forfeiture, and the established appellate practice that Congress intended to continue all point to this conclusion. "[I]n criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may

notice [forfeited error]." *Sykes* v. *United States,* 204 F. 909, 913–914 (CA8 1913). Accord, *Crawford* v. *United States,* 212 U. S. 183, 194 (1909); former Supreme Court Rule 27.6 (1939) (cited in Advisory Committee's Notes on Fed. Rule Crim. Proc. Rule 52(b), 18 U. S. C. App., p. 833) ("'[T]he court, at its option, may notice a plain error not assigned or specified'").

We previously have explained that the discretion conferred by Rule 52(b) should be employed "'in those circumstances in which a miscarriage of justice would otherwise result.'" *Young,* 470 U. S., at 15 (quoting *Frady, supra,* at 163, n. 14). In our collateral-review jurisprudence, the term "miscarriage of justice" means that the defendant is actually innocent. See, *e. g., Sawyer* v. *Whitley,* 505 U. S. 333, 339–340 (1992). The court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant, see, *e. g., Wiborg* v. *United States,* 163 U. S. 632 (1896), but we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.

Rather, the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in *United States* v. *Atkinson,* 297 U. S. 157 (1936). The court of appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.,* at 160. As we explained in *Young,* the "standard laid down in *United States* v. *Atkinson* [was] codified in Federal Rule of Criminal Procedure 52(b)," 470 U. S., at 7, and we repeatedly have quoted the *Atkinson* language in describing plain-error review, see *id.,* at 15; *Frady, supra,* at 163, n. 13; *Silber* v. *United States,* 370 U. S. 717, 718 (1962) *(per curiam); Johnson* v. *United States,* 318 U. S. 189, 200 (1943); *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 239 (1940); see also *Connor* v. *Finch,* 431 U. S. 407, 421, n. 19 (1977) (civil appeal). An error may "seriously affect the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence. Conversely, a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard, for otherwise the discretion afforded by Rule 52(b) would be illusory.

With these basic principles in mind, we turn to the instant case.

III

The presence of alternate jurors during jury deliberations is no doubt a deviation from Rule 24(c). The Rule explicitly states: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." It is a separate question whether such deviation amounts to "error" when the defendant consents to the alternates' presence. The Government supposes that there was indeed an "error" in this case, on the premise that Rule 24(c) is nonwaivable, see Reply Brief for United States 9, n. 4, and we assume without deciding that this premise is correct. The Government also essentially concedes that the "error" was "plain." See *id.*, at 8–9, and n. 4.

We therefore focus our attention on whether the error "affect[ed] substantial rights" within the meaning of Rule 52(b), and conclude that it did not. The presence of alternate jurors during jury deliberations is not the kind of error that "affect[s] substantial rights" independent of its prejudicial impact. Nor have respondents made a specific showing of prejudice. Finally, we see no reason to presume prejudice here.

Assuming *arguendo* that certain errors "affec[t] substantial rights" independent of prejudice, the instant violation of Rule 24(c) is not such an error. Although the presence of alternate jurors does contravene "'the cardinal principle that the deliberations of the jury shall remain private and secret,'" Advisory Committee's Notes on Fed. Rule Crim. Proc. 23(b), 18 U. S. C. App., p. 785 (quoting *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868, 872 (CA4 1964)), the primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence. "[I]f no harm resulted from this intrusion [of an alternate juror into the jury room,] reversal would be pointless." *United States* v. *Watson,* 669 F. 2d 1374, 1391 (CA11 1982). We generally have analyzed outside intrusions upon the jury for prejudicial impact. See, *e. g., Parker* v. *Gladden,* 385 U. S. 363 (1967) *(per curiam)* (bailiff's comments to jurors, such as "Oh that wicked fellow he is guilty," were prejudicial); *Patton* v. *Yount,* 467 U. S. 1025 (1984) (pretrial publicity was not prejudicial); *Holbrook* v. *Flynn,* 475 U. S. 560 (1986) (presence of uniformed state troopers in courtroom was not prejudicial). A prime example is *Remmer* v. *United States,* 347 U. S. 227 (1954), where an outsider had communicated with a juror during a criminal trial, appearing to offer a bribe, and the Federal Bureau of Investigation then had investigated the incident. We noted that "[t]he sending of an F. B. I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror," and remanded for the District Court to "determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.,* at 229–230.

This "intrusion" jurisprudence was summarized in *Smith* v. *Phillips,* 455 U. S. 209 (1982):

> "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.,* at 217.

There may be cases where an intrusion should be presumed prejudicial, see, *e. g., Patton, supra,* at 1031–1035; *Turner* v. *Louisiana,* 379 U. S. 466 (1965), but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict? We cannot imagine why egregious comments by a bailiff to a juror *(Parker)* or an apparent bribe followed by an official investigation *(Remmer)* should be evaluated in terms of "prejudice," while the mere *presence* of alternate jurors during jury deliberations should not. Of course, the issue here is whether the alternates' presence sufficed to establish remedial authority under Rule 52(b), not whether it violated the Sixth Amendment or Due Process Clause, but we see no reason to depart from the normal interpretation of the phrase "affecting substantial rights."

The question, then, is whether the instant violation of Rule 24(c) prejudiced respondents, either specifically or presumptively. In theory, the presence of alternate jurors during jury deliberations might prejudice a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through "body language"; or because the alternates' presence exerted a "chilling" effect on the regular jurors. See *Watson, supra,* at 1391; *United States* v. *Allison,* 481 F. 2d 468, 472 (CA5 1973). Conversely, "if the alternate in fact abided by the court's instructions to remain orally silent and not to otherwise indicate his views or attitude . . . and if the presence of the alternate did not operate as a restraint upon the regular jurors' freedom of expression and action, we see little substantive difference between the presence of [the alternate] and the presence in the juryroom of an unexamined book which had not been admitted into evidence." *Id.,* at 472.

Respondents have made no specific showing that the alternate jurors in this case either participated in the jury's deliberations or "chilled" deliberation by the regular jurors. We need not decide whether testimony on this score by the alternate jurors or the regular jurors, through affidavits or at a *Remmer*-like hearing, would violate Federal Rule of Evidence 606(b), compare *Watson, supra,* at 1391–1392, and n. 17, with *United States* v. *Beasley,* 464 F. 2d 468 (CA10 1972), or whether the courts of appeals have authority to remand for *Remmer*-like hearings on plain-error review. Respondents have never requested a hearing, and thus the record before us contains no direct evidence that the alternate jurors influenced the verdict. On this record, we are not persuaded that the instant violation of Rule 24(c) was actually prejudicial.

Nor will we presume prejudice for purposes of the Rule 52(b) analysis here. The Court of Appeals was incorrect in finding the error "inherently prejudicial." 934 F. 2d, at 1439. Until the close of trial, the 2 alternate jurors were indistinguishable from the 12 regular jurors. Along with the regular jurors, they commenced their office with an oath, see Tr. 212 (Mar. 2, 1987), received the normal initial admonishment, see *id.,* at 212–218, heard the same evidence and arguments, and were not identified as alternates until *after* the District Court gave a final set of instructions, see App. 89–90. In those instructions, the District Court specifically enjoined the jurors that "according to the law, the alternates must not participate in the deliberations," and reiterated, "we are going to ask that you not participate." *Ibid.* The Court of Appeals should not have supposed that this injunction was contravened. "[It is] the almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh,* 481 U. S. 200, 206 (1987). "[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis* v. *Franklin,* 471 U. S. 307, 324, n. 9 (1985). See also *Strickland* v. *Washington,* 466 U. S. 668, 694 (1984) (in assessing prejudice for purposes of ineffective-assistance claim, "a court should presume . . . that the judge or jury acted according to law"). Nor do we think that the mere presence of alternate jurors entailed a sufficient risk of "chill" to justify a presumption of prejudice on that score.

In sum, respondents have not met their burden of showing prejudice under Rule 52(b). Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the deviation from Rule 24(c) was prejudicial.

Because the conceded error in this case did not "affec[t] substantial rights," the Court of Appeals had no authority to correct it. We need not consider whether the error, if prejudicial, would have warranted correction under the *Atkinson* standard as "seriously affect[ing] the fairness, integrity or public reputation of judicial proceedings." The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE KENNEDY, concurring.

I join the Court's opinion and add this brief statement to express my own understanding of the Court's holding.

When a court notices an error on its own initiative under Federal Rule of Criminal Procedure 52(b), see *Silber* v. *United States*, 370 U. S. 717, 718 (1962) *(per curiam)*, it may be awkward to say that the case is decided by burden of proof concepts, for by definition none of the parties have addressed the issue. But the Court's opinion is phrased with care to indicate that burden of proof concepts are the normal or usual mode of analysis of error under Rule 52, see *ante*, at 734–735, and so other rules may apply where the aggrieved party has not raised the issue. In most cases, however, the party will have raised the alleged error on appeal. In that context, the analysis the Court adopts today is helpful, for it gives operative effect to the difference under Rule 52 between those cases where an objection has been preserved and those where it has not.

That leads me to a final point, which is the independent force of the Rule against permitting alternates in the jury room during deliberations. As the Court is careful to note, this case was submitted on the assumption that it is error to follow this practice, and the Court does not question that premise. Indeed, there are good reasons to suppose that Federal Rule of Criminal Procedure 24(c) is the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties. See Reply Brief for United States 9, n. 4. In the course of a lengthy trial, defense counsel, who may have numerous requests for rulings pending before a district court, may acquiesce in a proposal from the bench concerning jury composition so that counsel can concentrate on matters they deem more pressing. In such a climate, the trial court ought not to put counsel in the position of having to object to a suggestion that compromises the Federal Rules.

If there were a case in which a specific objection had been made and overruled, the systemic costs resulting from the Rule 24(c) violation would likely be significant, since it would seem to me most difficult for the Government to show the absence of prejudice, which would be required to avoid reversal of the conviction under Rule 52(a). Rule 24(c) is based on certain premises about group dynamics that make it difficult for us to know how the jury's deliberations may have been affected. Defendants seeking reversal under Rule 52(b) are also likely to experience these difficulties in proving prejudice. But, as the Court makes clear today, the operation of Rule 52(b) does not permit a party to withhold an objection to the presence of alternate jurors during jury deliberations and then to demand automatic reversal.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

Under Federal Rule of Criminal Procedure 24(c), the trial judge in this case had a clear and unqualified duty to dismiss the alternate jurors at the end of the trial. Indeed, she could no more admit the alternate jurors into the jury room than she could afford any stranger access to that room while the defendants' guilt or innocence was being decided. There can be no question but that the trial judge's failure to abide by the strictures of Rule 24(c) resulted in a violation of the "'cardinal principle that the deliberations of the jury shall remain private and secret in every case.'" Advisory Committee's Notes on Fed. Rule Crim. Proc. 23(b), 18 U. S. C. App., p. 785 (quoting *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868, 872 (CA4 1964).

In my view, it is equally evident that this violation implicated "substantial rights" within the meaning of Rule 52. I cannot agree with the Court's suggestion in Part III of its opinion that Rule 24(c) errors may be deemed to "affect substantial rights" only when they have a prejudicial impact on a particular defendant. At least some defects bearing on the jury's deliberative function are subject to reversal regardless of whether prejudice can be shown, not only because it is so difficult to measure their effects on a jury's decision, but also because such defects "undermin[e] the structural integrity of the criminal tribunal itself." *Vasquez* v. *Hillery*, 474 U. S. 254, 263–264 (1986) (racial discrimination in selection of grand jury); see also *Gray* v. *Mississippi*, 481 U. S. 648, 668 (1987); *id.*, at 669 (Powell, J., concurring) (improper exclusion of juror opposed to death penalty). Whether or not they harm the defendant, errors that call into question the integrity of the jury's deliberations may harm the system as a whole. In that sense, they may be said to "seriously affect the fairness, integrity or public reputation of judicial proceedings," *United States* v. *Atkinson,* 297 U. S. 157, 160 (1936), making them candidates for reversal under Rule 52. See *United States* v. *Young,* 470 U. S. 1, 15 (1985) (citing *Atkinson, supra*).

The phrase "substantial rights" appears twice in Rule 52: once in Rule 52(a), which describes the harmless-error rule, and again in Rule 52(b), in connection with the plain-error rule. See *ante,* at 731. Presumably, the words have the same meaning each time they are used. If the majority's understanding of "substantial rights" is correct, then even an objection by respondents to the alternates' presence during jury deliberations would not have mandated reversal here; instead, the Rule 24(c) violation would have been subject to harmless-error review, as it did not "affect substantial rights" within the meaning of Rule 52(a). I cannot concur in reasoning that would lead to this result. Had respondents objected, and had the trial court nonetheless refused to follow the plain dictates of Rule 24(c), deliberately rejecting the considered judgment of the Rule's drafters, I think it clear that reversal would have been the proper response, with or without a showing of prejudice.

Reading "substantial rights" the same way in Rule 52(b) as in Rule 52(a) does not, of course, eliminate the difference between cases in which no objection is made and those in which one is. A nonforfeited error affecting substantial rights must be corrected under Rule 52(a). A forfeited error, however, even if it is plain and affects substantial rights, "may" be corrected at the discretion of the reviewing court under Rule 52(b). See Fed. Rule Crim. Proc. 52(b); *ante,* at 735–737. It is this distinction between automatic and discretionary reversal that gives practical effect to the difference between harmless-error and plain-error review, and also every incentive to the defendant to raise objections at the trial level.

In this case, for instance, to say that the Rule 24(c) violation affected substantial rights for purposes of Rule 52 does not answer the ultimate, and, in my view, more difficult question presented: whether the Court of Appeals properly exercised its discretion to remedy the error. After considering the nature of the error, the degree to which the respondents can be said to have consented to the procedure in question, see *ante,* at 727–729, and the likelihood that the procedure actually affected the outcome of the jury deliberations, a reasonable judge could well have concluded that the Rule 24(c) error in this case did not call for reversal under Rule 52(b). Rather, an opinion emphasizing the significance of the error, designed to provide guidance to the trial courts for future cases, might have been viewed as an appropriate response.

The courts of appeals are, however, allowed a wide measure of discretion in the supervision of litigation in their respective circuits. See *Ortega-Rodriguez* v. *United States,* 507 U. S. 234, 251, n. 24 (1993); *Thomas* v. *Arn,* 474 U. S. 140, 146–148 (1985). Certainly, the courts of appeals are better positioned than we are to evaluate the need for firm enforcement of a procedural rule designed to protect the integrity of jury deliberations and to weigh the interest in such enforcement against other relevant considerations. Because I am not persuaded that the Court of Appeals here abused its broad discretion, I would affirm its judgment.

UNITED STATES *v.* CALIFORNIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–2003. Argued February 23, 1993—Decided April 26, 1993

After California issued sales and use tax deficiency notices to federal contractor Williams Brothers Engineering Company (WBEC) in 1978 and 1982, the State assessed approximately $14 million in such taxes against WBEC for the tax years 1975 through 1981. Under its contract with the United States, WBEC received an annual fixed fee plus reimbursement for costs, including the state taxes. At the Government's direction, WBEC applied to the State Board of Equalization for redetermination of the assessments, but each claim was denied, with minor exceptions. WBEC then paid the assessments under protest, using funds the Government provided, and filed timely actions in state court. In January 1988, the State and WBEC stipulated to a $3 million refund and to dismissal of the actions without prejudice. In May 1988, the Government filed suit in the Federal District Court, seeking a declaratory judgment that California had classified and taxed WBEC erroneously under state law and an $11 million refund plus interest. In granting the State summary judgment, the District Court rejected the Government's argument that it was entitled to recovery based on the federal common-law cause of action for money had and received. The Court of Appeals affirmed.

Held: The Federal Government may not recover the taxes it claims were wrongfully assessed under California law against WBEC. Pp. 751–760.

(a) Shouldering the entire economic burden of a levy through indemnification does not give the Government a federal common law cause of action for money had and received to challenge a state tax on state-law grounds simply because it is the Government. The contract here is in all relevant respects identical to the ones discussed in *United States* v. *New Mexico*, 455 U. S. 720, in which the Court held, *inter alia*, that federal contractors are not immune from state taxes simply because the Government reimburses all of the contractors' state tax expenditures, see *id.*, at 734–735. Moreover, the Government's voluntary agreement to reimburse (or even fund in advance) WBEC for the taxes does not make the Government's payments direct disbursements of federal funds to the State. Cf. *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575. Thus, the Government cannot use the existence of its obligation to indemnify WBEC to create the asserted federal cause of action. *Bayne* v. *United States*, 93 U. S. 642, and *Gaines* v. *Miller*, 111 U. S. 395, share two features this case lacks and therefore are inapposite. Because WBEC (1) did not steal or otherwise unlawfully take the money at issue from the Government, and (2) did not have a relationship with California that would make the State liable for WBEC's actions, the Court does not imply a contract in law between California and the Government. Without an implied contract, an action for money had and received will not lie against the State. See *Bayne, supra,* at 643. Pp. 751–756.

(b) Because it indemnified WBEC, the Government has a right to be subrogated to WBEC's claims against the State. Under traditional principles of subrogation, however, a subrogee takes no more rights than its subrogor had. In this case, WBEC dismissed its state-law actions and the state statute of limitations has run against it. The Government argues that state statutes of limitations do not apply to it, but in *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, this Court held that even if that were true, the principle did not apply when the Government acquired a right by assignment after the statute of limitations has run against the assignor. *Id.,* at 141–142. Although the Government acquired a right to be subrogated to WBEC's claims when it paid the taxes, it was not subrogated to those claims until it filed this proceeding in federal court. By then, the state statute of limitations had run; thus, the Government was not subrogated to "a right free of a pre-existing infirmity." *Id.,* at 142. Pp. 756–759.

932 F. 2d 1346, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Acting Solicitor General Bryson, Acting Assistant Attorney General Bruton, Deputy Solicitor General Wallace, David English Carmack,* and *John J. McCarthy.*

Robert D. Milam, Deputy Attorney General of California, argued the cause for respondents. With him on the brief were *Daniel E. Lungren,* Attorney General, and *Timothy G. Laddish,* Assistant Attorney General.*

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*Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Tom Udall,* Attorney General of New Mexico, and *Frank D. Katz,* Special Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Robert A. Marks* of Hawaii, *Roland W. Burris* of

JUSTICE O'CONNOR delivered the opinion of the Court.

This is another in the long line of cases, beginning with *McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), in which the Federal Government asks this Court for relief from what it considers illegal state taxes. Unlike the typical tax immunity case, however, we are not presented with a claim that the state tax is unconstitutional; instead, the question is whether the Federal Government may recover taxes it claims were wrongfully assessed under California law against one of the Government's private contractors.

I

The United States has established three Naval Petroleum Reserves in California and Wyoming, one of which is Naval Petroleum Reserve No. 1, located in Kern County, California. 10 U. S. C. § 7420. First through the Department of the Navy and later through the Department of Energy, the United States contracted with Williams Brothers Engineering Company (WBEC) to manage oil drilling operations at Reserve No. 1 from 1975 to 1985. Under the contract, WBEC received an annual fixed fee plus reimbursement for costs, which the contract defined to include state sales and use taxes.

California assessed approximately $14 million in sales and use taxes, pursuant to Cal. Rev. & Tax. Code Ann. § 6384 (West 1987), against WBEC for the years 1975 through 1981.

Illinois, *Bonnie J. Campbell* of Iowa, *Richard P. Ieyoub* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Hubert H. Humphrey III* of Minnesota, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Frankie Sue Del Papa* of Nevada, *George Dana Bisbee* of New Hampshire, *Robert J. Del Tufo* of New Jersey, *Robert Abrams* of New York, *Lee Fisher* of Ohio, *Susan B. Loving* of Oklahoma, *Charles S. Crookham* of Oregon, *Ernest D. Preate, Jr.,* of Pennsylvania, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, *Jeffrey L. Amestoy* of Vermont, *Mary Sue Terry* of Virginia, and *Joseph B. Meyer* of Wyoming; and for the Council of State Governments et al. by *Richard Ruda.*

The State informed WBEC of the tax deficiencies through two notices, one issued in July 1978 and the other in December 1982. WBEC, at the direction of the United States, applied to the California Board of Equalization for administrative redetermination of the assessments, see § 6932. WBEC argued that the State had misapplied its own law, taxing property that was outside the scope of § 6384. The Board of Equalization denied each claim, with minor exceptions. Thereafter, WBEC paid the assessments under protest, using funds the Federal Government provided. It then filed timely actions in state court. In January 1988, the State and WBEC stipulated to a $3 million refund, for erroneous assessments on property that WBEC had purchased and that Government personnel had installed, and to dismissal of both actions without prejudice. The remaining $11 million resulted from assessments on property that WBEC had purchased and that private subcontractors, managed by WBEC, had installed.

In May 1988, the United States filed suit in the Eastern District of California, seeking a declaratory judgment that California had classified and taxed WBEC erroneously under California law and that the taxed property actually was exempt. It sought a refund of the $11 million plus interest. In the course of the suit, the United States argued it was entitled to recovery based on the federal common-law cause of action for money had and received. The District Court rejected both grounds for recovery and granted summary judgment for the State.

The Court of Appeals for the Ninth Circuit affirmed. 932 F. 2d 1346 (1991). The court began by noting that the Government did not claim that either it or WBEC was constitutionally immune from the tax, an argument this Court rejected in *United States* v. *New Mexico*, 455 U. S. 720 (1982). 932 F. 2d, at 1347–1348. Because the United States lacked "a colorable constitutional challenge," *id.*, at 1349, the Court of Appeals looked to whether federal common law might provide a cause of action. It declined to accept the Government's argument that the simple act of disbursing federal funds was a "constitutional function" that created a federal interest in conflict with state law. The Government had done no more than pay state taxes pursuant to state law; this did not rise to the level of a federal interest requiring the application of federal law. *Ibid.* The Court of Appeals then held that the Government could not maintain a quasi-contract cause of action because the facts did not support a claim of unjust enrichment. Among other things, "WBEC, backed throughout by the United States, had a fair chance to argue against the validity of the assessments in the administrative and state court proceedings." *Id.*, at 1350. Finally, the Court of Appeals relied on the fact that the Government's quasi-contract argument was "posited upon the interpretation of a state-created exemption from a state[]-created sales tax." *Ibid.* The court found that the State's claim filing requirements, including that a court action be filed within 90 days of an administrative denial, were conditions precedent to a cause of action for a tax refund. *Id.*, at 1350–1351. The Government had failed to satisfy the conditions; therefore, the Court of Appeals held, the Government had no state cause of action and no quasi-contract action. "Since federal statutes of limitations become determinative only after the government acquires a cause of action, and since the United States never acquired a cause of action," the court reasoned, the 6-year statute of limitations of "28 U. S. C. § 2415 does not apply." *Id.*, at 1351.

The Court of Appeals acknowledged that the Court of Appeals for the Eleventh Circuit, in a factually similar case, recently had reached the opposite conclusion. *Id.*, at 1351–1352. In *United States* v. *Broward County,* 901 F. 2d 1005 (1990), the Eleventh Circuit rejected the argument on which the Ninth Circuit relied and held that the Government had a "federal common law cause of action in quasi-contract for money had and received." *Id.*, at 1008–1009. We granted certiorari to resolve the conflict. 506 U. S. 813 (1992).

II

The Government concedes that it could have intervened in WBEC's administrative and state-court proceedings. Tr. of Oral Arg. 17. But it argues that whether it complied with state procedural requirements or whether it could have intervened is irrelevant, because it has a federal right to recover the taxes under the federal common-law cause of action for money had and received (also known as *indebitatus assumpsit*). Prior to the creation of federal administrative and statutory remedies for the recovery of federal taxes, this Court held that a taxpayer could bring an action for money had and received to recover erroneously or illegally assessed taxes. In *City of Philadelphia* v. *The Collector*, 5 Wall. 720 (1867), the Court stated:

> "[The] [a]ppropriate remedy to recover back money paid [to federal tax collectors] under protest on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received. Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back, if the assessment was erroneous or illegal, in an action of assumpsit for money had and received." *Id.*, at 731–732 (citing *Elliott* v. *Swartwout*, 10 Pet. 137, 150 (1836)).

The Government reasons that it paid WBEC's taxes, that the taxes were wrongfully assessed, and that therefore it may recover the funds used to pay those taxes. Since an action for money had and received is based on a contract implied in law, see *Bayne* v. *United States*, 93 U. S. 642, 643 (1877), the Government further reasons that its claims are governed by the 6-year statute of limitations in 28 U. S. C. § 2415(a), and not the 90-day limitation period in the California Code.

The taxpayers in both *City of Philadelphia* and the case on which it relies, *Elliott* v. *Swartwout,* were attempting to recover money they had paid under protest to the federal tax collector in settlement of tax assessments erroneously made against them. In this case, by contrast, the taxpayer—WBEC—has had its day in court and gone home. The Government attempts to recover money it paid in reimbursement for state tax assessments against the contractor, even though the contractor already has challenged the assessment and accepted a resolution of its claims. The Government contends that, because its contract with WBEC involved an advanced funding arrangement, the Government was the one that actually paid the state taxes. Because the disbursement of *federal funds* is involved, the Government asserts, the federal action for money had and received is appropriate. Even assuming that federal courts may entertain a federal common-law action for the recovery of state taxes paid by the Government, we conclude that a federal action is inappropriate here because the Government is in no better position than as a subrogee of its contractor WBEC.

The management contract between the Government and WBEC is in all relevant respects identical to the contracts we discussed in *United States* v. *New Mexico,* 455 U. S. 720 (1982). There, as here, the State had imposed sales and use taxes on private contractors managing Department of Energy sites. Like WBEC, two of the contractors received costs plus a fixed fee. *Id.,* at 723–724. Like WBEC's contracts, the contracts provided that title to all tangible personal property passed directly from the vendor to the Government. *Id.,* at 724. "Finally, and most importantly, the contracts use[d] a so-called 'advanced funding' procedure to meet contractor costs." *Id.,* at 725. The contractors paid creditors and employees with drafts drawn on a special bank account in which the Government deposited funds, so that only federal funds were expended when the contractors made purchases. *Id.,* at 726. Cf. App. 142–143 (Declaration of Kenneth Meeks in Support of United States' Motion for Summary Judgment, describing similar funding operations with WBEC).

In *New Mexico,* the Government brought an action arguing that the contractors' expenditures, other than those made out of the fixed fees, were constitutionally immune from taxation. We noted that the doctrine of federal immunity from state taxation is "one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions." 455 U. S., at 730. After surveying our "confusing" precedents, we concluded it was time to return to the underlying constitutional principle of tax immunity: A State may not lay a tax " 'directly upon the United States.' " *Id.,* at 733 (quoting *Mayo* v. *United States,* 319 U. S. 441, 447 (1943)). But whereas the Government is absolutely immune from direct taxes, it is not immune from taxes merely because they have an "effect" on it, or "even because the Federal Government shoulders the entire economic burden of the levy." 455 U. S., at 734. In fact, it is "constitutionally irrelevant that the United States reimburse[s] all the contractor's expenditures, including those going to meet the tax." *Ibid.* (citing *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941)). Tax immunity is "appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities." 455 U. S., at 735.

It is beyond peradventure that California did not tax—indeed, could not have taxed—the Federal Government in this case. California taxed WBEC. And the Government's voluntary agreement to reimburse (or even fund in advance) WBEC for those taxes does not make the Government's payments direct disbursements of federal funds to the State. We addressed an analogous indemnification relationship in *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575 (1943). The United States had contracted with a private corporation to operate a Maritime Commission vessel. A customs inspector suffered injuries on the vessel that led to his death, and his widow brought a maritime tort action against the private corporation. In defense, respondent contended "that if the judgment against [it] stands, the United States ultimately will have to pay it by reason of provisions of the contract between respondent and the [Maritime] Commission. It is therefore urged that the United States is the real party in interest." *Id.*, at 582. We rejected respondent's argument that petitioner could be deprived of her cause of action by reason of the contract. "Immunity from suit on a cause of action which the law creates cannot be so readily obtained." *Id.*, at 583. Absent congressional action, we would not allow "concessions made by contracting officers of the government" to make such a "basic alteration" in the law. *Id.*, at 584.

We conclude from *Brady* and *New Mexico* that the Government cannot use the existence of an obligation to indemnify WBEC to create a federal cause of action for money had and received to recover state taxes paid by WBEC any more than the Roosevelt Steamship Company could use the existence of a right to indemnity from the Government to defeat a claim for recovery. See *Brady, supra*, at 584. Cf. *Farid* v. *Smith*, 850 F. 2d 917, 923 (CA2 1988) (a State's decision to indemnify its public servants does not confer Eleventh Amendment immunity on state officials sued in their personal capacity).

Although the Government does not cite *Brady*, it does cite two other cases that suggest the lesson of *Brady* might not apply in an action for money had and received. According to the Government, *Bayne* v. *United States*, 93 U. S. 642 (1877), and *Gaines* v. *Miller*, 111 U. S. 395 (1884), stand for the proposition that an action for money had and received may "be employed by the United States to recover money from a third party who received federal funds that had been misappropriated by a government agent." Brief for United

States 14. We find these cases inapposite. In *Bayne,* an Army paymaster withdrew money from the paymaster's bank account, endorsed the checks in blank, and sent them to Merchants' Bank with instructions to credit the account of Bayne & Co. The Court affirmed the Government's judgment against Bayne & Co. under an action for money had and received. 93 U. S., at 643. In *Gaines,* the agent of an estate's executors sold estate property and illegally kept a portion of the money. 111 U. S., at 396. Many years later, the agent had died, but Gaines, the legatee of the first estate, brought an action in equity against the administrator of the agent's estate. The Court affirmed the lower court's judgment against Gaines because, among other reasons, she had an adequate remedy at law: an action for money had and received. *Id.,* at 397–398.

Bayne and *Gaines* share two features this case lacks. The first is that, in each, the rightful owner of the money lost it by way of theft. That is, the money passed from the first party to the second party unlawfully. See *Bayne, supra,* at 643; *Gaines, supra,* at 396. The second feature is that in both cases the rightful owner of the money sued a third party who had a relationship that, at least for our purposes, made that party legally responsible for the actions of the one who unlawfully took the money. The Court was satisfied in *Bayne* that the transactions between the paymaster, the banks, and Bayne & Co. were "the result of a fraudulent purpose to secure the use of the public money to Bayne & Co., who received it with full knowledge that it belonged to the United States, and had been applied in manifest violation of the act of Congress." 93 U. S., at 643. In other words, Bayne & Co. and the paymaster were accomplices, each liable for the acts of the other. Cf. 18 U. S. C. §2. In *Gaines,* petitioner sued the administrator of the agent's estate, who was legally responsible for paying the agent's debts out of the estate. See, *e. g.,* 2 J. Perkins, Law of Executors and Administrators 988–990 (6th Am. ed. 1877).

The Government does not contend that WBEC stole the money at issue in this case or otherwise took money from the Government unlawfully. WBEC did not. Nor does the Government contend that California and WBEC had a relationship that would make California liable for WBEC's actions. They did not. In fact, California and WBEC had an adverse relationship: that of creditor and debtor. California's demand that WBEC pay what California believed to be a lawful debt does not make California legally responsible for the Government's indemnification of WBEC. In these circumstances, we do not imply a contract in law between California and the Government. Without an implied contract, an action for money had and received will not lie against the State.

Although the Government cannot proceed in an action for money had and received, our discussion of indemnification suggests the Government may not be without recourse: Because it indemnified the contractor, the Government has a right to be subrogated to the contractor's claims against the State. See 10 W. Jaeger, Williston on Contracts § 1265 (3d ed. 1967); Brief for Respondents 13 (conceding the same). When proceeding by subrogation, the subrogee "stands in the place of one whose claim he has paid." *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 242 (1947). Here WBEC's rights have lapsed and its claims are barred. Under traditional subrogation principles then, the claims of the United States also would be barred. The subrogee, who has all the rights of the subrogor, usually "cannot acquire by subrogation what another whose rights he claims did not have." *Ibid.* Although WBEC filed actions in state court within 90 days of the Board of Equalization's administrative decisions, WBEC later dismissed those cases without prejudice. A dismissal without prejudice terminates the action and "concludes the rights of the parties in that particular action." *Gagnon Co.* v. *Nevada Desert Inn*, 45 Cal. 2d 448, 455, 289 P. 2d 466, 472 (1955). A subrogee could have proceeded only if WBEC could have filed a new state-court action at that time, which it could not do.

The traditional rules of subrogation, however, do not necessarily apply to the Government. But cf. *United States* v. *Standard Oil Co. of Cal.*, 332 U. S. 301, 309 (1947) (suggesting that state law controls "where the Government has simply substituted itself for others as successor to rights governed by state law"). The Government argues strenuously that, at the very least, state statutes of limitations do not bind it. It cites three cases to support this position. See *United States* v. *Summerlin*, 310 U. S. 414, 416 (1940); *Board of Comm'rs of Jackson County* v. *United States*, 308 U. S. 343, 351 (1939); *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U. S. 301, 308 (1960). In the cases the Government cites, however, either the right at issue was obtained by the Government through, or created by, a federal statute, see *Summerlin, supra*, at 416 (United States suing under claim received by assignment pursuant to Act of June 27, 1934, 48 Stat. 1246); *Board of Comm'rs, supra*, at 349–350 (United States suing as Indian trustee pursuant to congressional statute); or a federal statute provided the statute of limitations, see *John Hancock, supra*, at 301 (United States redeeming mortgage foreclosure pursuant to statute of limitations in 28 U. S. C. §2410(c)). Moreover, in each case, the Government was proceeding in its sovereign capacity. As the Government rightly notes:

> "When the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." *Summerlin, supra*, at 417.

In contrast, the Government here became entitled to its claim by indemnifying a private contractor's state-law debt. It can assert its claim only by way of subrogation, an equitable action created by the courts. *Summerlin* is clearly distinguishable.

Whether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question. We need not resolve it today, however, because *Guaranty Trust Co.* v. *United States,* 304 U. S. 126 (1938), provides guidance in this case. There the United States was proceeding as the assignee of the Soviet Government and sought to collect under state law. The petitioner argued that the statute of limitations had run, and the United States asserted, among other defenses, that it was not bound by state statutes of limitations. We found that the circumstances of the case "admit[ted] of no appeal to such a policy." *Id.,* at 141. Even if the United States had a right to be free from the statute of limitations, it was deprived of no right on those facts. "[F]or the proof demonstrate[d] that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid." *Id.,* at 142.

Here, although the Government acquired a right to subrogation to WBEC's claims upon payment of the taxes, the Government did not assert that right until it filed the federal judicial proceeding. As the California Supreme Court has held: "'[A] surety by payment does not become *ipso facto* subrogated to the rights of the creditor, but only acquires a right to such subrogation, and . . . before the substitution or equitable assignment can actually take place he must actively assert his equitable right thereto. It is not a substantive tangible right of such nature and character that it can be seized and held and enjoyed independently of a judicial proceeding.'" *Offer* v. *Superior Court of San Francisco,* 194 Cal. 114, 117, 228 P. 11, 12 (1924) (quoting 25 Ruling Case Law 1391 (1919)). Accord, 10 Jaeger, Williston on Contracts § 1265, at 848, and n. 9 (citing cases). Because the Government waited until after the state statute of limitations had run against WBEC to bring suit, the Government was not subrogated to "a right free of a pre-existing infirmity." *Guaranty Trust, supra,* at 142. That the doctrine of subrogation is one of equity only strengthens our conclusion that the Government may not proceed: The Government waited 10 years after the first notice of deficiency was issued, 8 years after the second notice was issued, and almost 6 years after the state statute of limitations ran to bring this suit.

The Government argues that affirming the Court of Appeals often will leave it "without an effective remedy to contest a tax improperly exacted from a federal contractor" and subject it to the "vagaries" of 50 state tax-law procedures. Brief for United States 26–27. But federal contractors already are subject to the substantive tax laws of the 50 States. Nothing in our decision prevents the Government from including in its contracts a requirement that its contractors be responsible for all taxes the Government believes are wrongfully assessed, a contract term that likely would remove any disinterest a contractor may have toward litigating in state court. If our decision today results in an intolerable drain on the public fisc, Congress, which can take into account the concerns of the States as well as the Federal Government, is free to address the situation. See *New Mexico,* 455 U. S., at 737–738.

III

In *United States* v. *New Mexico,* we held that the Federal Government is immune only from state taxes imposed on it directly. *Id.,* at 734. In so holding, we hoped to "forestall, at least to a degree, some of the manipulation and wooden formalism that occasionally have marked tax litigation—and that have no proper place in determining the allocation of power between coexisting sovereignties." *Id.,* at 737. Today we hold that shouldering the "entire economic burden of the levy," *id.,* at 734, through indemnification does not give the Federal Government a federal common-law cause of action for money had and received to challenge a state tax on state-law grounds simply because it is the Government. To do otherwise would be to return to the "manipulation and wooden formalism" we put aside in *New Mexico.*

The judgment of the Court of Appeals is

Affirmed.

EDENFIELD ET AL. *v.* FANE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91–1594. Argued December 7, 1992—Decided April 26, 1993

Respondent Fane, a certified public accountant (CPA) licensed to practice by the Florida Board of Accountancy, sued the Board for declaratory and injunctive relief on the ground that its rule prohibiting CPA's from engaging in "direct, in-person, uninvited solicitation" to obtain new clients violated the First and Fourteenth Amendments. He alleged that but for the prohibition he would seek clients through personal solicitation, as he had done while practicing in New Jersey, where such solicitation is permitted. The Federal District Court enjoined the rule's enforcement, and the Court of Appeals affirmed.

Held: As applied to CPA solicitation in the business context, Florida's prohibition is inconsistent with the free speech guarantees of the First and Fourteenth Amendments. Pp. 765–777.

(a) The type of personal solicitation prohibited here is clearly commercial expression to which First Amendment protections apply. *E. g., Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, which upheld a ban on in-person solicitation by lawyers, did not hold that all personal solicitation is without First Amendment protection. In denying CPA's and their clients the considerable advantages of solicitation in the commercial context, Florida's law threatens societal interests in broad access to complete and accurate commercial information that the First Amendment is designed to safeguard. However, commercial speech is "linked inextricably" with the commercial arrangement that it proposes, so that the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. Thus, Florida's rule need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny. See, *e. g., Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 564. Pp. 765–767.

(b) Even under the intermediate *Central Hudson* standard of review, Florida's ban cannot be sustained as applied to Fane's proposed speech. The Board's asserted interests—protecting consumers from fraud or overreaching by CPA's and maintaining CPA independence and ensuring against conflicts of interest—are substantial. However, the Board has failed to demonstrate that the ban advances those interests in any direct and material way. A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Here, the Board's suppositions about the dangers of personal solicitation by CPA's in the business context are not validated by studies, anecdotal evidence, or Fane's own conduct; and its claims are contradicted by a report of the American Institute of Certified Public Accountants and other literature. Nor can the ban be justified as a reasonable time, place, or manner restriction on speech. Even assuming that a flat ban on commercial solicitation could be regarded as such a restriction, the ban still must serve a substantial state interest in a direct and material way. Pp. 767–773.

(c) The ban cannot be justified as a prophylactic rule because the circumstances of CPA solicitation in the business context are not "inherently conducive to overreaching and other forms of misconduct." *Ohralik, supra,* at 464. Unlike a lawyer, who is trained in the art of persuasion, a CPA is trained in a way that emphasizes independence and objectivity rather than advocacy. Moreover, while a lawyer may be soliciting an unsophisticated, injured, or distressed lay person, a CPA's typical prospective client is a sophisticated and experienced business executive who has an existing professional relation with a CPA, who selects the time and place for their meeting, and for whom there is no expectation or pressure to retain the CPA on the spot. In addition, *Ohralik* in no way relieves a State of the obligation to demonstrate that its restrictions on speech address a serious problem and contribute in a material way to solving that problem. Pp. 773–777.

945 F. 2d 1514, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 777. O'CONNOR, J., filed a dissenting opinion, *post,* p. 778.

Parker D. Thomson, Special Assistant Attorney General of Florida, argued the cause for petitioners. With him on the briefs were *Robert A. Butterworth,* Attorney General, *John J. Rimes III,* Assistant Attorney General, and *Carol A. Licko,* Special Assistant Attorney General.

David C. Vladeck argued the cause for respondent. With him on the brief was *Alan B. Morrison.**

JUSTICE KENNEDY delivered the opinion of the Court.

In previous cases we have considered the constitutionality of state laws prohibiting lawyers from engaging in direct, personal solicitation of prospective clients. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978); *In re Primus*, 436 U. S. 412 (1978). In the case now before us, we consider a solicitation ban applicable to certified public accountants (CPA's) enacted by the State of Florida. We hold that, as applied to CPA solicitation in the business context, Florida's prohibition is inconsistent with the free speech guarantees of the First and Fourteenth Amendments.

I

Respondent Scott Fane is a CPA licensed to practice in the State of Florida by the Florida Board of Accountancy (Board). Before moving to Florida in 1985, Fane had his own accounting CPA practice in New Jersey, specializing in providing tax advice to small and medium-sized businesses. He often obtained business clients by making unsolicited telephone calls to their executives and arranging meetings to explain his services and expertise. This direct, personal, uninvited solicitation was permitted under New Jersey law.

When he moved to Florida, Fane wished to build a practice similar to his solo practice in New Jersey but was unable to do so because the Board of Accountancy had a comprehensive rule prohibiting CPA's from engaging in the direct, personal solicitation he had found most effective in the past. The Board's rules provide that a CPA "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication." Fla. Admin. Code § 21A–24.002(2)(c) (1992). "[D]irect, in-person, uninvited solicitation" means "any communication which directly or implicitly requests an immediate oral response from the recipient," which, under the Board's rules, includes all "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client." § 21A–24.002(3).

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*Briefs of *amici curiae* urging affirmance were filed for the American Advertising Federation et al. by *Richard E. Wiley, Howard H. Bell, Gilbert H. Weil,* and *Robert J. Levering;* and for the American Association of Attorney-Certified Public Accountants, Inc., by *L. Harold Levinson, David Ostrove,* and *Sydney S. Traum.*

Kenneth R. Hart filed a brief for the Florida Institute of Certified Public Accountants as *amicus curiae.*

The rule, according to Fane's uncontradicted submissions, presented a serious obstacle, because most businesses are willing to rely for advice on the accountants or CPA's already serving them. In Fane's experience, persuading a business to sever its existing accounting relations or alter them to include a new CPA on particular assignments requires the new CPA to contact the business and explain the advantages of a change. This entails a detailed discussion of the client's needs and the CPA's expertise, services and fees. See Affidavit of Scott Fane ¶¶ 7, 11, App. 11, 15.

Fane sued the Board in the United States District Court for the Northern District of Florida, seeking declaratory and injunctive relief on the ground that the Board's antisolicitation rule violated the First and Fourteenth Amendments. Fane alleged that but for the prohibition he would seek clients through personal solicitation and would offer fees below prevailing rates. Complaint ¶¶ 9–11, App. 3–4.

In response to Fane's submissions, the Board relied on the affidavit of Louis Dooner, one of its former chairmen. Dooner concluded that the solicitation ban was necessary to preserve the independence of CPA's performing the attest function, which involves the rendering of opinions on a firm's financial statements. His premise was that a CPA who solicits clients "is obviously in need of business and may be willing to bend the rules." App. 23. In Dooner's view, "[i]f [a CPA] has solicited the client he will be beholden to him." *Id.*, at 19. Dooner also suggested that the ban was needed to prevent "overreaching and vexatious conduct by the CPA." *Id.*, at 23.

The District Court gave summary judgment to Fane and enjoined enforcement of the rule "as it is applied to CPA's who seek clients through in-person, direct, uninvited solicitation in the business context." Civ. Case No. 88–40264–MNP (ND Fla., Sept. 13, 1990), App. 88. A divided panel of the Court of Appeals for the Eleventh Circuit affirmed. 945 F. 2d 1514 (1991).

We granted certiorari, 504 U. S. 940 (1992), and now affirm.

II

In soliciting potential clients, Fane seeks to communicate no more than truthful, nondeceptive information proposing a lawful commercial transaction. We need not parse Fane's proposed communications to see if some parts are entitled to greater protection than the solicitation itself. This case comes to us testing the solicitation, nothing more. That is what the State prohibits and Fane proposes.

Whatever ambiguities may exist at the margins of the category of commercial speech, see, *e. g., Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 384–388 (1973), it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply. *E. g., Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976). While we did uphold a ban on in-person solicitation by lawyers in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), that opinion did not hold that all personal solicitation is without First Amendment protection. See *id.*, at 457. There are, no doubt, detrimental aspects to personal commercial solicitation in certain circumstances, see *id.*, at 464, and n. 23, but these detriments are not so inherent or ubiquitous that solicitation of this sort is removed from the ambit of First Amendment protection, cf. *United States* v. *Kokinda,* 497 U. S. 720, 725 (1990) (plurality opinion) ("Solicitation is a recognized form of speech protected by the First Amendment"); see also *International Society for Krishna Consciousness* v. *Lee,* 505 U. S. 672, 677 (1992).

In the commercial context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. A seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact. Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service and allows both parties to discuss and negotiate the desired form for the transaction or professional relation. Solicitation also enables the seller to direct his proposals toward those consumers who he has a reason to believe would be most interested in what he has to sell. For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market. In particular, with respect to nonstandard products like the professional services offered by CPA's, these benefits are significant.

In denying CPA's and their clients these advantages, Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. See *Virginia State Bd. of Pharmacy, supra,* at 762–765; *Bates* v. *State Bar of Arizona,* 433 U. S. 350, 377–378 (1977); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.,* 447 U. S. 557, 561–562 (1980).

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment. See *Virginia State Bd. of Pharmacy, supra,* at 762.

Commercial speech, however, is "linked inextricably" with the commercial arrangement that it proposes, *Friedman* v. *Rogers,* 440 U. S. 1, 10, n. 9 (1979), so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. See *Ohralik, supra,* at 457. For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny. *Board of Trustees of State University of N. Y.* v. *Fox,* 492 U. S. 469, 480 (1989); *Central Hudson Gas & Electric Corp.,* 447 U. S., at 564. Even under this intermediate standard of review, however, Florida's blanket ban on direct, in-person, uninvited solicitation by CPA's cannot be sustained as applied to Fane's proposed speech.

III

To determine whether personal solicitation by CPA's may be proscribed under the test set forth in *Central Hudson* we must ask whether the State's interests in proscribing it are substantial, whether the challenged regulation advances these interests in a direct and material way, and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served. See *ibid.* Though we conclude that the Board's asserted interests are substantial, the Board has failed to demonstrate that its solicitation ban advances those interests.

A

In undertaking the first inquiry, we must identify with care the interests the State itself asserts. Unlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions. See *Fox, supra,* at 480. Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction. See, *e. g., Mississippi Univ. for Women* v. *Hogan,* 458 U. S. 718, 730 (1982).

To justify its ban on personal solicitation by CPA's, the Board proffers two interests. First, the Board asserts an interest in protecting consumers from fraud or overreaching by CPA's. Second, the Board claims that its ban is necessary to maintain both the fact and appearance of CPA independence in auditing a business and attesting to its financial statements.

The State's first interest encompasses two distinct purposes: to prevent fraud and other forms of deception, and to protect privacy. As to the first purpose, we have said that "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely," *Virginia State Bd. of Pharmacy,* 425 U. S., at 771–772, and our cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification, see, *e. g., Central Hudson Gas & Electric Corp., supra,* at 563–564; *In re R. M. J.,* 455 U. S. 191, 203 (1982); *Metromedia, Inc.* v. *San Diego,* 453 U. S. 490, 507 (1981) (plurality opinion). Indeed, 25 States and the District of Columbia take various forms of this approach, forbidding solicitation by CPA's only under circumstances that would render it fraudulent, deceptive, or coercive. See, *e. g.,* Code of Colo. Regs. § 7.12 (1991); N. D. Admin. Code § 3–04–06–02 (1991); N. H. Code Admin. Rules § 507.02(c) (1990); D. C. Mun. Reg., Tit. 17, § 2513.4 (1990). But where, as with the blanket ban involved here, truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the *Central Hudson* test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end. See *In re R. M. J., supra,* at 203. For purposes of that test, there is no question that Florida's interest in ensuring the accuracy of commercial information in the marketplace is substantial. See, *e. g., Virginia State Bd. of Pharmacy, supra,* at 771–772; *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.,* 483 U. S. 522, 539 (1987); *Friedman* v. *Rogers, supra,* at 13.

Likewise, the protection of potential clients' privacy is a substantial state interest. Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In *Ohralik,* we made explicit that "protection of the public from these aspects of solicitation is a legitimate and important state interest." 436 U. S., at 462.

The Board's second justification for its ban—the need to maintain the fact and appearance of CPA independence and to guard against conflicts of interest—is related to the audit and attest functions of a CPA. In the course of rendering these professional services, a CPA reviews financial statements and attests that they have been prepared in accordance with generally accepted accounting principles and present a fair and accurate picture of the firm's financial condition. See generally R. Gormley, Law of Accountants and Auditors ¶ 1.07[4] (1981); 1 American Institute of Certified Public Accountants, Professional Standards AU § 110.01 (1991) (hereinafter AICPA Professional Standards). In the Board's view, solicitation compromises the independence necessary to perform the audit and attest functions, because a CPA who needs business enough to solicit clients will be prone to ethical lapses. The Board claims that even if actual misconduct does not occur, the public perception of CPA independence will be undermined if CPA's behave like ordinary commercial actors.

We have given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions. See, *e. g., Ohralik, supra,* at 460; *Virginia State Bd. of Pharmacy, supra,* at 766; *National Soc. of Professional Engineers* v. *United States,* 435 U. S. 679, 696 (1978). With regard to CPA's, we have observed that they must "maintain total independence" and act with "complete fidelity to the public trust" when serving as independent auditors. *United States* v. *Arthur Young & Co.,* 465 U. S. 805, 818 (1984). Although the State's interest in obscuring the commercial nature of public accounting practice is open to doubt, see *Bates* v. *Arizona State Bar Assn.,* 433 U. S., at 369–371, the Board's asserted interest in maintaining CPA independence and ensuring against conflicts of interest is not. We acknowledge that this interest is substantial. See *Ohralik, supra,* at 460–461.

B

That the Board's asserted interests are substantial in the abstract does not mean, however, that its blanket prohibition on solicitation serves them. The penultimate prong of the *Central Hudson* test requires that a regulation impinging upon commercial expression "directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Central Hudson Gas & Electric Corp.,* 447 U. S., at 564. We agree with the Court of Appeals that the Board's ban on CPA solicitation as applied to the solicitation of business clients fails to satisfy this requirement.

It is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 71, n. 20 (1983); *Fox,* 492 U. S., at 480. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. See, *e. g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626, 648–649 (1985); *Bolger, supra,* at 73; *In re R. M. J.,* 455 U. S., at 205–206; *Central Hudson Gas & Electric Corp., supra,* at 569; *Friedman* v. *Rogers,* 440 U. S., at 13–15; *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 95 (1977). Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

The Board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way. It presents no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear. The record does not disclose any anecdotal evidence, either from Florida or another State, that validates the Board's suppositions. This is so even though 21 States place no specific restrictions of any kind on solicitation by CPA's, and only 3 States besides Florida have enacted a categorical ban. See 3 La. Admin. Code 46:XIX.507(D)(1)(c) (Supp. 1988); Minn. Admin. Code § 1100.6100 (1991); 22 Tex. Admin. Code § 501.44 (Supp. 1992). Not even Fane's own conduct suggests that the Board's concerns are justified. Cf. *Ohralik, supra,* at 467–468. The only suggestion that a ban on solicitation might help prevent fraud and overreaching or preserve CPA independence is the affidavit of Louis Dooner, which contains nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications.

The Board directs the Court's attention to a report on CPA solicitation prepared by the American Institute of Certified Public Accountants in 1981. See AICPA, Report of the Special Committee on Solicitation (1981), App. 29. The Report contradicts, rather than strengthens, the Board's submissions. The AICPA Committee stated that it was "unaware of the existence of any empirical data supporting the theories that CPAs (a) are not independent of clients obtained by direct uninvited solicitation, or (b) do not maintain their independence in mental attitude toward those clients subjected to direct uninvited solicitation by another CPA." *Id.*, at 4, App. 38. Louis Dooner's suggestion that solicitation of new accounts signals the need for work and invites an improper approach from the client ignores the fact that most CPA firms desire new clients. The AICPA Report discloses no reason to suspect that CPA's who engage in personal solicitation are more desperate for work, or would be any more inclined to compromise their professional standards, than CPA's who do not solicit, or who solicit only by mail or advertisement. With respect to the prospect of harassment or overreaching by CPA's, the report again acknowledges an "absence of persuasive evidence that direct uninvited solicitation by CPAs is likely to lead to false or misleading claims or oppressive conduct." *Id.*, at 2, App. 35.

Other evidence concerning personal solicitation by CPA's also belies the Board's concerns. In contrast to the Board's anxiety over uninvited solicitation, the literature on the accounting profession suggests that the main dangers of compromised independence occur when a CPA firm is too dependent upon, or involved with, a longstanding client. See, *e. g.*, P. Cottell & T. Perlin, Accounting Ethics 39–40 (1990); G. Previts, The Scope of CPA Services: A Study of the Development of the Concept of Independence and the Profession's Role in Society 142 (1985); S. Rep. No. 95–34, pp. 50–52 (1977); General Accounting Office, CPA Audit Quality: Status of Actions Taken to Improve Auditing and Financial Reporting of Public Companies 36 (Mar. 1989) (GAO/AFMD–89–38). It appears from the literature that a business executive who wishes to obtain a favorable but unjustified audit opinion from a CPA would be less likely to turn to a stranger who has solicited him than to pressure his existing CPA, with whom he has an ongoing, personal relation and over whom he may also have some financial leverage. See *id.*, at 34 ("A company using the threat of changing accountants—opinion shopping—to pressure its existing accounting firm to accept a less than desirable accounting treatment is one way independence is threatened"); Cottell & Perlin, *supra*, at 34 (noting that independence can be eroded if a client is served by a single auditor for a great length of time).

For similar reasons, we reject the Board's alternative argument that the solicitation ban is a reasonable restriction on the manner in which CPA's may communicate with prospective clients, rather than a direct regulation of the commercial speech itself. Assuming that a flat ban on commercial solicitation could be regarded as a content-neutral time, place, or manner restriction on speech, a proposition that is open to serious doubt, see, *e. g.*, *Virginia State Bd. of Pharmacy*, 425 U. S., at 771, a challenged restriction of that type still must serve a substantial state interest in "a direct and effective way," *Ward* v. *Rock Against Racism*, 491 U. S. 781, 800 (1989). The State has identified certain interests in regulating solicitation in the accounting profession that are important and within its legitimate power, but the prohibitions here do not serve these purposes in a direct and material manner. Where a restriction on speech lacks this close and substantial relation to the governmental interests asserted, it cannot be, by definition, a reasonable time, place, or manner restriction.

C

Relying on *Ohralik*, the Board seeks to justify its solicitation ban as a prophylactic rule. It acknowledges that Fane's solicitations may not involve any misconduct but argues that all personal solicitation by CPA's must be banned, because this contact most often occurs in private offices and is difficult to regulate or monitor.

We reject the Board's argument and hold that, as applied in this context, the solicitation ban cannot be justified as a prophylactic rule. *Ohralik* does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional in all circumstances. Because "the distinctions, historical and functional, between professions, may require consideration of quite different factors," *Virginia State Bd. of Pharmacy, supra,* at 773, n. 25, the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation. Later cases have made this clear, explaining that *Ohralik*'s holding was narrow and depended upon certain "unique features of in-person solicitation by lawyers" that were present in the circumstances of that case. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S., at 641; see also *Shapero* v. *Kentucky Bar Assn.,* 486 U. S. 466, 472 (1988).

Ohralik was a challenge to the application of Ohio's ban on attorney solicitation and held only that a State Bar "constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." *Ohralik,* 436 U. S., at 449. While *Ohralik* discusses the generic hazards of personal solicitation, see *id.,* at 464–466, the opinion made clear that a preventative rule was justified only in situations "inherently conducive to overreaching and other forms of misconduct." *Id.,* at 464; cf. *In re R. M. J.,* 455 U. S., at 203 (advertising may be banned outright only if it is actually or inherently misleading). The Court in *Ohralik* explained why the case before it met this standard:

> "[T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal rep-

> resentation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited." 436 U. S., at 465–466 (footnotes omitted).

The solicitation here poses none of the same dangers. Unlike a lawyer, a CPA is not "a professional trained in the art of persuasion." A CPA's training emphasizes independence and objectivity, not advocacy. See 1 AICPA Professional Standards AU § 220; 2 *id.*, ET § 55; H. Magill & G. Previts, CPA Professional Responsibilities: An Introduction 105–108 (1991). The typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik*. Fane's prospective clients are sophisticated and experienced business executives who understand well the services that a CPA offers. See Affidavit of Scott Fane ¶¶ 5–7, 10(A), App. 10–11, 13. In general, the prospective client has an existing professional relation with an accountant and so has an independent basis for evaluating the claims of a new CPA seeking professional work. *Id.*, ¶ 6, App. 10–11.

The manner in which a CPA like Fane solicits business is conducive to rational and considered decisionmaking by the prospective client, in sharp contrast to the "uninformed acquiescence" to which the accident victims in *Ohralik* were prone. *Ohralik, supra,* at 465. While the clients in *Ohralik* were approached at a moment of high stress and vulnerability, the clients Fane wishes to solicit meet him in their own offices at a time of their choosing. If they are unreceptive to his initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern.

If a prospective client does decide to meet with Fane, there is no expectation or pressure to retain Fane on the spot; instead, he or she most often exercises caution, checking references and deliberating before deciding to hire a new CPA. See Affidavit of Scott Fane ¶ 10(C), App. 13–14. Because a CPA has access to a business firm's most sensitive financial records and internal documents, retaining a new accountant is not a casual decision. *Ibid.* The engagements Fane seeks are also long term in nature; to the extent he engages in unpleasant, high pressure sales tactics, he can impair rather than improve his chances of obtaining an engagement or establishing a satisfactory professional relation. The importance of repeat business and referrals gives the CPA a strong incentive to act in a responsible and decorous manner when soliciting business. In contrast with *Ohralik,* it cannot be said that under these circumstances, personal solicitation by CPA's "more often than not will be injurious to the person solicited." *Ohralik,* 436 U. S., at 466.

The Board's reliance on *Ohralik* is misplaced for yet another reason: The Board misunderstands what *Ohralik* meant when it approved the use of a prophylactic rule. *Id.,* at 464. The ban on attorney solicitation in *Ohralik* was prophylactic in the sense that it prohibited conduct conducive to fraud or overreaching at the outset, rather than punishing the misconduct after it occurred. But *Ohralik* in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem. See *ibid.* (describing the State's fear of harm from attorney solicitation as "well founded").

Were we to read *Ohralik* in the manner the Board proposes, the protection afforded commercial speech would be reduced almost to nothing; comprehensive bans on certain categories of commercial speech would be permitted as a matter of course. That would be inconsistent with the results reached in a number of our prior cases. See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U. S. 626 (1985); *Bates* v. *State Bar of Arizona,* 433 U. S. 350 (1977); *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85 (1977). It would also be inconsistent with this Court's general approach to the use of preventative rules in the First Amendment context. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U. S. 415, 438 (1963) (citations omitted). Even under the First Amendment's somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest. Here, the ends sought by the State are not advanced by the speech restriction, and legitimate commercial speech is suppressed. For this reason, the Board's rule infringes upon Fane's right to speak, as guaranteed by the Constitution.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion, just as I joined JUSTICE STEVENS' recent opinion for the Court in *Cincinnati* v. *Discovery Network, Inc., ante,* p. 410, with the observation that I again disengage myself from any part thereof, or inference therefrom, that commercial speech that is free from fraud or duress or the advocacy of unlawful activity is entitled to only an "intermediate standard," see *ante,* at 767, of protection under the First Amendment's proscription of any law abridging the freedom of speech.

JUSTICE O'CONNOR, dissenting.

I continue to believe that this Court took a wrong turn with *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech. See *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985); *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988); *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (1990) (plurality opinion). These cases consistently focus on whether the challenged advertisement directly harms the listener: whether it is false or misleading, or amounts to "overreaching, invasion of privacy, [or] the exercise of undue influence," *Shapero, supra*, at 475. This focus is too narrow. In my view, the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large. See *Zauderer, supra*, at 676–677 (O'CONNOR, J., concurring in part, concurring in judgment in part, and dissenting in part); *Shapero, supra*, at 488–491 (O'CONNOR, J., dissenting); *Peel, supra*, at 119 (O'CONNOR, J., dissenting). In particular, the States may prohibit certain "forms of competition usual in the business world," *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792 (1975) (internal quotation marks omitted), on the grounds that pure profit seeking degrades the public-spirited culture of the profession and that a particular profit-seeking practice is inadequately justified in terms of consumer welfare or other social benefits. Commercialization has an incremental, indirect, yet profound effect on professional culture, as lawyers know all too well.

But even if I agreed that the States may target only professional speech that directly harms the listener, I still would dissent in this case. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), held that an attorney could be sanctioned for the in-person solicitation of two particularly vulnerable potential clients, because of the inherent risk under such circumstances that the attorney's speech would be directly harmful, and because a simple prohibition on fraud or overreaching would be difficult to enforce in the context of in-person solicitation. See *id.*, at 464–468. The result reached by the majority today cannot be squared with *Ohralik.*

Although *Ohralik* preceded *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557 (1980), this Court has understood *Ohralik* to mean that a rule prohibiting in-person solicitation by attorneys would satisfy the *Central Hudson* test. See *Shapero, supra,* at 472. Such a rule would "directly advanc[e] the governmental interest [and would not be] more extensive than is necessary to serve that interest." *Central Hudson, supra,* at 566. A substantial fraction of in-person solicitations are inherently conducive to overreaching or otherwise harmful speech, and these potentially harmful solicitations cannot be singled out in advance (or so a reasonable legislator could believe).

I see no constitutional difference between a rule prohibiting in-person solicitation by attorneys, and a rule prohibiting in-person solicitation by certified public accountants (CPA's). The attorney's rhetorical power derives not only from his specific training in the art of persuasion, see *ante,* at 774–775, but more generally from his *professional expertise.* His certified status as an expert in a complex subject matter—the law—empowers the attorney to overawe inexpert clients. CPA's have an analogous power. The drafters of Fla. Admin. Code § 21A–24.002(2)(c) (1992) reasonably could have envisioned circumstances analogous to those in *Ohralik*, where there is a substantial risk that the CPA will use his professional expertise to mislead or coerce a naive potential client.

Indeed, the majority scrupulously declines to question the validity of Florida's rule. The majority never analyzes the rule itself under *Central Hudson*, cf. *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 340–344 (1986) (analyzing "facial" validity of law regulating commercial speech by employing *Central Hudson* test), but instead seeks to avoid this analysis by characterizing Fane's suit as an "as-applied" challenge. See *ante*, at 763, 767, 770, 771, 774. I am surprised that the majority has taken this approach without explaining or even articulating the underlying assumption: that a commercial speaker can claim First Amendment protection for particular instances of prohibited commercial speech, even where the prohibitory law satisfies *Central Hudson*. *Board of Trustees of State University of N. Y.* v. *Fox*, 492 U. S. 469 (1989), appears to say the opposite, see *id.*, at 476–486, and we recently granted certiorari in a case that poses precisely this issue, see *United States* v. *Edge Broadcasting Co.*, 506 U. S. 1032 (1992).

In any event, the instant case is *not* an "as-applied" challenge, in the sense that a speaker points to special features of his own speech as constitutionally protected from a valid law. Cf. *Zauderer*, *supra*, at 644. The majority obscures this point by stating that Florida's rule "cannot be sustained as applied to Fane's proposed speech," *ante*, at 767, and by paraphrasing Fane's affidavit at length to show that he does not propose to solicit vulnerable clients, *ante*, at 775–776. But I do not understand the relevance of that affidavit here, because the broad remedy granted by the District Court goes well beyond Fane's own speech.

> "Florida Administrative Code, §§ 21A–24.002(2) and (3), places an unconstitutional ban on protected commercial speech in violation of the first . . . amendmen[t].

> The Board of Accountancy and State are hereby enjoined from enforcing that regulation as it is applied to CPAs who seek clients through in-person, direct, uninvited solicitation in the business context." App. 88.

Even if the majority is correct that a law satisfying *Central Hudson* cannot be applied to harmless commercial speech, and that Fane's proposed speech will indeed be harmless, these two premises do not justify an injunction against the enforcement of the antisolicitation rule *to all CPA's.*

The majority also relies on the fact that petitioners were enjoined only from enforcing the rule in the "business context." See *ante,* at 763, 771. Yet this narrowing of focus, without more, does not salvage the District Court's remedy. I fail to see why § 21A–24.002(2)(c) should be valid overall, but not "in the business context." Small businesses constitute the vast majority of business establishments in the United States, see U. S. Dept. of Commerce, Statistical Abstract of the United States 526 (1992). The drafters of Florida's rule reasonably could have believed that the average small businessman is no more sophisticated than the average individual who is wealthy enough to hire a CPA for his personal affairs.

In short, I do not see how the result reached by the majority is consistent with the validity of § 21A–24.002(2)(c). In failing to state otherwise, the majority implies that the rule itself satisfies *Central Hudson,* and I agree, but on that precise grounds I would reverse the judgment of the Court of Appeals.

REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 781 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR FEBRUARY 22 THROUGH APRIL 26, 1993

FEBRUARY 22, 1993

Affirmed on Appeal

No. 91–1992. FIGURES ET AL. *v.* HUNT, GOVERNOR OF ALABAMA, ET AL. Affirmed on appeal from D. C. S. D. Ala. Reported below: 785 F. Supp. 1491.

No. 92–805. DEWITT ET AL. *v.* FOLEY, SPEAKER OF THE HOUSE OF REPRESENTATIVES, ET AL. Affirmed on appeal from D. C. N. D. Cal.

Certiorari Granted—Vacated and Remanded

No. 92–282. PEARSON ET AL. *v.* PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN) ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263 (1993). Reported below: 961 F. 2d 390.

No. 92–6180. LACEY *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crosby* v. *United States*, 506 U. S. 255 (1993). Reported below: 969 F. 2d 926.

Certiorari Granted—Reversed. (See No. 92–609, *ante*, p. 1.)

Miscellaneous Orders. (See also No. 9, Orig., *ante*, p. 7.)

No. — — —. NORTH JERSEY SECRETARIAL SCHOOL, INC. *v.* DEPARTMENT OF EDUCATION ET AL.;
No. — — —. FAIRLEY *v.* C & P TELEPHONE CO.;
No. — — —. EVAN ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.; and
No. — — —. GUICE-MILLS *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. ———. DUROCHER *v.* FLORIDA; and

No. ———. MCPETERS *v.* CALIFORNIA. Motions for leave to proceed *in forma pauperis* without affidavits of indigency executed by petitioners granted.

No. D-1202. IN RE DISBARMENT OF LEIGHTON. Disbarment entered. [For earlier order herein, see 506 U. S. 970.]

No. D-1203. IN RE DISBARMENT OF BAUCUM. Disbarment entered. [For earlier order herein, see 506 U. S. 970.]

No. D-1205. IN RE DISBARMENT OF ISAACKS. Disbarment entered. [For earlier order herein, see 506 U. S. 970.]

No. D-1206. IN RE DISBARMENT OF BREIT. Disbarment entered. [For earlier order herein, see 506 U. S. 983.]

No. D-1208. IN RE DISBARMENT OF BEATY. Disbarment entered. [For earlier order herein, see 506 U. S. 995.]

No. D-1209. IN RE DISBARMENT OF WHITE. Disbarment entered. [For earlier order herein, see 506 U. S. 995.]

No. D-1211. IN RE DISBARMENT OF MCCLEAN. Disbarment entered. [For earlier order herein, see 506 U. S. 995.]

No. D-1212. IN RE DISBARMENT OF AGUILAR. Disbarment entered. [For earlier order herein, see 506 U. S. 995.]

No. D-1213. IN RE DISBARMENT OF VERIZZO. Disbarment entered. [For earlier order herein, see 506 U. S. 995.]

No. D-1215. IN RE DISBARMENT OF MAYBLUM. Disbarment entered. [For earlier order herein, see 506 U. S. 995.]

No. D-1216. IN RE DISBARMENT OF HAYES. Disbarment entered. [For earlier order herein, see 506 U. S. 1017.]

No. D-1228. IN RE DISBARMENT OF BUCK. It is ordered that Thomas Randolph Buck, of Plantation, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1229. IN RE DISBARMENT OF VEITH. It is ordered that Douglas Veith, of Papillion, Neb., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1230. In re Disbarment of Roth. It is ordered that James G. Roth, of Miami Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1231. In re Disbarment of Gross. It is ordered that Howard Gross, of Miami Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1232. In re Disbarment of Thibideau. It is ordered that Lance Joseph Thibideau, of Fort Lauderdale, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1233. In re Disbarment of Irek. It is ordered that Kenneth Frank Irek, of Raleigh, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1234. In re Disbarment of Rice. It is ordered that Wilfred Carlmond Rice, of Litchfield, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1235. In re Disbarment of Ushijima. It is ordered that Michael Masaharu Ushijima, of Algonquin, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1236. In re Disbarment of Protokowicz. It is ordered that Stanley Edward Protokowicz, Jr., of Bel Air, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1237. IN RE DISBARMENT OF MATUSOW. It is ordered that Arthur J. Matusow, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for award of compensation and fees granted, and the River Master is awarded a total of $7,318.93 for the period October 1 through December 31, 1992, to be paid equally by the parties. [For earlier order herein, see, *e. g.,* 506 U. S. 983.]

No. 91–261. BUILDING & CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.; and

No. 91–274. MASSACHUSETTS WATER RESOURCES AUTHORITY ET AL. *v.* ASSOCIATED BUILDERS & CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL. C. A. 1st Cir. [Certiorari granted, 504 U. S. 908.] Motion of the Acting Solicitor General for leave to file a supplemental brief as *amicus curiae* after argument granted.

No. 91–871. BATH IRON WORKS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL., 506 U. S. 153. Motion of respondent Ernest Brown for award of attorney's fees denied without prejudice to refiling in the United States Court of Appeals for the First Circuit.

No. 92–102. DAUBERT ET UX., INDIVIDUALLY AND AS GUARDIANS AD LITEM FOR DAUBERT, ET AL. *v.* MERRELL DOW PHARMACEUTICALS, INC. C. A. 9th Cir. [Certiorari granted, 506 U. S. 914.] Motion of American College of Legal Medicine for leave to participate in oral argument as *amicus curiae,* for divided argument, and for additonal time for oral argument denied.

No. 92–166. KEENE CORP. *v.* UNITED STATES. C. A. Fed. Cir. [Certiorari granted, 506 U. S. 939.] Motion of Dico, Inc., to withdraw *amicus curiae* brief denied.

No. 92–207. UNITED STATES *v.* PADILLA ET AL. C. A. 9th Cir. [Certiorari granted, 506 U. S. 952.] Motion of respondents for divided argument denied. Motion of respondent Xavier V. Padilla for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Walter B. Nash III, Esq., of Tucson, Ariz., be appointed to serve as counsel for respondent Xavier V. Padilla in this case.

No. 92–311. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* SCHAEFER. C. A. 8th Cir. [Certiorari granted *sub nom. Sullivan* v. *Schaefer,* 506 U. S. 997.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 92–357. SHAW ET AL. *v.* GERSON, ACTING ATTORNEY GENERAL, ET AL. D. C. E. D. N. C. [Probable jurisdiction noted *sub nom. Shaw* v. *Barr,* 506 U. S. 1019.] Motion of the Acting Solicitor General for divided argument granted.

No. 92–484. UNITED STATES NATIONAL BANK OF OREGON *v.* INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL.; and

No. 92–507. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, ET AL. *v.* INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 506 U. S. 1032.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted. Motion of the Acting Solicitor General for divided argument denied.

No. 92–515. WISCONSIN *v.* MITCHELL. Sup. Ct. Wis. [Certiorari granted, 506 U. S. 1033.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–621. RAKE ET AL. *v.* WADE, TRUSTEE. C. A. 10th Cir. [Certiorari granted, 506 U. S. 972.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–725. GODINEZ, WARDEN *v.* MORAN. C. A. 9th Cir. [Certiorari granted, 506 U. S. 1033.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–551. CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ALPINE RIDGE GROUP ET AL. C. A.

9th Cir. [Certiorari granted *sub nom. Kemp* v. *Alpine Ridge Group,* 506 U. S. 984.] Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 92-602. St. Mary's Honor Center et al. *v.* Hicks. C. A. 8th Cir. [Certiorari granted, 506 U. S. 1042.] Motion of respondent for leave to proceed further herein *in forma pauperis* denied.

No. 92-785. Rock Creek Limited Partnership *v.* California State Water Resources Control Board et al. C. A. 9th Cir.; and

No. 92-1077. American Airlines, Inc. *v.* Davies. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 92-6033. McNeil *v.* United States. C. A. 7th Cir. [Certiorari granted, 506 U. S. 1074.] Motion for appointment of counsel granted, and it is ordered that Allen E. Shoenberger, Esq., of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 92-6378. Mahdavi *v.* Regents of the University of California. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [506 U. S. 1019] denied.

No. 92-6730. Swartz *v.* Florida Bar et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 15, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Justice Blackmun and Justice Stevens, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.,* 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

No. 92-6849. Betka *v.* A-T Industries, Inc., et al. Sup. Ct. Ore.; and

No. 92-6944. Restrepo et al. *v.* First National Bank of Dona Ana County, New Mexico. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioners are allowed until March 15, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petitions for writs of certiorari.

No. 92–7099. IN RE CAMILO MONTOYA. Petition for writ of habeas corpus denied.

No. 92–1005. IN RE STEINHILBER;
No. 92–1050. IN RE RISK MANAGERS INTERNATIONAL, INC., ET AL.;
No. 92–1052. IN RE SULLIVAN; and
No. 92–7231. IN RE HEWLETT. Petitions for writs of mandamus denied.

No. 92–6789. IN RE LIGHTFOOT. Petition for writ of mandamus and/or prohibition denied.

No. 92–6709. IN RE WATSON. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 92-519. WETHERELL, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. *v.* DE GRANDY ET AL.;
No. 92–593. DE GRANDY ET AL. *v.* WETHERELL, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL.; and
No. 92–767. UNITED STATES *v.* FLORIDA ET AL. Appeals from D. C. N. D. Fla. Motion of American Jewish Congress et al. for leave to file a brief as *amici curiae* in No. 92–519 granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 815 F. Supp. 1550.

Certiorari Granted

No. 92–1123. IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA *v.* U. S. PHILIPS CORP. ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 971 F. 2d 728.

No. 91–1523. FLORENCE COUNTY SCHOOL DISTRICT FOUR ET AL. *v.* CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, CARTER. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 950 F. 2d 156.

No. 92–757. LANDGRAF *v.* USI FILM PRODUCTS ET AL. C. A. 5th Cir.; and

No. 92–938. RIVERS ET AL. *v.* ROADWAY EXPRESS, INC. C. A. 6th Cir. Certiorari in No. 92–757 granted limited to Question 1 presented by the petition. Certiorari in No. 92–938 granted limited to Question 1 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: No. 92–757, 968 F. 2d 427; No. 92–938, 973 F. 2d 490.

Certiorari Denied

No. 90–1575. LEWIS *v.* PEARSON FOUNDATION, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 917 F. 2d 1077.

No. 91–6933. CINTRON-RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 945 F. 2d 496.

No. 91–7567. SCHLUP *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 91–7733. RADLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 949 F. 2d 400.

No. 92–443. ELFELT ET AL. *v.* COOPER. Sup. Ct. Wis. Certiorari denied. Reported below: 168 Wis. 2d 1008, 485 N. W. 2d 56.

No. 92–495. GREEN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 963 F. 2d 783.

No. 92–501. BACHNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 946 F. 2d 1546.

No. 92–613. HARRY AND JEANETTE WEINBERG FOUNDATION INC. *v.* CROYDEN ASSOCIATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 969 F. 2d 675.

No. 92–631. SMITH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1446.

No. 92–649. SCHUMACHER ET AL. *v.* NIX, CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 965 F. 2d 1262.

No. 92–673. BUTLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 955 F. 2d 48.

No. 92–681. NOVOTNY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 22.

No. 92–687. WILLMAR ELECTRIC SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 45, 968 F. 2d 1327.

No. 92–694. MCGRANAGHAN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 92–722. SPENCER GIFTS, INC. *v.* OLITSKY; and
No. 92–917. OLITSKY *v.* SPENCER GIFTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1471.

No. 92–726. TORCASIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 959 F. 2d 503.

No. 92–730. INSURANCE COMPANY OF NORTH AMERICA *v.* UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1400.

No. 92–738. BREQUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 381.

No. 92–743. ECKERSLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 216.

No. 92–744. KRAFT, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 970 F. 2d 311.

No. 92–745. ASLAN *v.* HONGKONG & SHANGHAI BANKING CORP. ET AL.; and
No. 92–1063. HONGKONG & SHANGHAI BANKING CORP. ET AL. *v.* ASLAN. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 583.

No. 92–746. HUGHES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 964 F. 2d 536.

No. 92–758. CAMPBELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 962 F. 2d 1579.

No. 92–762. MAULDING *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 961 F. 2d 694.

No. 92–774. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 965 F. 2d 804.

No. 92–775. MAULA *v.* FRECKLETON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 972 F. 2d 27.

No. 92–777. INVENTION SUBMISSION CORP. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 124, 965 F. 2d 1086.

No. 92–779. JOHNSON ET AL. *v.* THOMPSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 971 F. 2d 1487.

No. 92–789. ATLANTIC RICHFIELD CO. *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 977 F. 2d 611.

No. 92–795. POUNDS *v.* GRIEPENSTROH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 970 F. 2d 338.

No. 92–799. ENVIRONMENTAL PROTECTION AGENCY *v.* ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–801. COMMODITIES EXPORT CO. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 972 F. 2d 1266.

No. 92–808. KNIGHT *v.* CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 17.

No. 92–815. FIGUEROA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 35 M. J. 54.

No. 92–824. GREAT DANE TRAILERS, INC. *v.* RUFFIN. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 989.

No. 92–825. LEE ET AL. *v.* TALLADEGA COUNTY BOARD OF EDUCATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 1426.

No. 92–827. COPP *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 968 F. 2d 1435.

No. 92–843. SAVE OUR CUMBERLAND MOUNTAINS, INC. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 374, 963 F. 2d 1541.

No. 92–855. ROYAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 643.

No. 92–869. ACTIVE ERECTORS & INSTALLERS, INC. *v.* HOFFMAN CONSTRUCTION COMPANY OF OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 969 F. 2d 796.

No. 92–877. ELLIOTT ET AL. *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 159 Vt. 102, 616 A. 2d 210.

No. 92–883. BERRY *v.* DOE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 967 F. 2d 1255.

No. 92–900. STIFFLER *v.* LUTHERAN HOSPITAL, DBA HOOPESTON COMMUNITY MEMORIAL HOSPITAL. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 137.

No. 92–902. BERGHMAN ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 171.

No. 92–907. WILKINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 345.

No. 92–909. TIPTON ET AL. *v.* BERGROHR GMBH-SIEGEN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 965 F. 2d 994.

No. 92–910. STOWE *v.* DAVIS ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 842 S. W. 2d 588.

No. 92–912. PRIMROSE OIL CO., INC. *v.* STEVEN D. THOMPSON TRUCKING, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–918. FRANKENBERRY *v.* MORGAN, SUPERINTENDENT OF STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–921. SHIH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 935 F. 2d 1294.

No. 92–924. Garthright, Executor *v.* Estate of Locke, Deceased. Ct. App. Tenn. Certiorari denied.

No. 92–925. Central Baptist Theological Seminary *v.* Minnesota Department of Natural Resources et al. Ct. App. Minn. Certiorari denied. Reported below: 487 N. W. 2d 528.

No. 92–932. Baker *v.* Bennett et al. Sup. Ct. Ala. Certiorari denied. Reported below: 603 So. 2d 928.

No. 92–934. Gould *v.* Smith, Trustee, Miami Center Liquidating Trust, et al. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 24.

No. 92–936. Neely *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1445.

No. 92–939. Spang & Co. *v.* Delgrosso et al. C. A. 3d Cir. Certiorari denied.

No. 92–941. Bote, a Minor, By and Through Her Guardian ad Litem, Rogers *v.* Thomas. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–942. Ames et ux. *v.* Sundance State Bank. C. A. 10th Cir. Certiorari denied. Reported below: 973 F. 2d 849.

No. 92–943. Campo *v.* Electro-Coal Transfer Corp., Inc.; and

No. 92–1211. National Union Fire Insurance Company of Pittsburgh, Pennsylvania *v.* Electro-Coal Transfer Corp., Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 970 F. 2d 51.

No. 92–944. Catlett, Heir of the Estate of Catlett, Deceased *v.* Richards, Individually and as Successor Administrator of the Estate of Catlett, Deceased, et al. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 92–945. Northwest Airlines, Inc. *v.* American Airlines, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 605.

No. 92–947. BMW of North America, Inc. *v.* Big Apple BMW, Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 974 F. 2d 1358.

No. 92–950. 23 WEST WASHINGTON STREET, INC. *v.* CITY OF HAGERSTOWN, MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–952. PFLUGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied.

No. 92–954. KING, AKA GREENE *v.* RUSSELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 1301.

No. 92–955. BRANSON *v.* STRAUCH. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–957. GARNER *v.* GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 176 App. Div. 2d 26, 580 N. Y. S. 2d 59.

No. 92–958. PICKREL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–959. PRITCHARD *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1221.

No. 92–971. PERRON *v.* BELL MAINTENANCE & FABRICATORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 970 F. 2d 1409.

No. 92–972. SOUTHERN SLIP FORM SERVICES, INC. *v.* LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT. Ct. App. La., 1st Cir. Certiorari denied.

No. 92–974. WATKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1217.

No. 92–981. MADSEN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MADSEN, AND AS GUARDIAN FOR MADSEN *v.* ALLSTATE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1340.

No. 92–983. WILSON *v.* STATE FARM FIRE & CASUALTY CO. C. A. 7th Cir. Certiorari denied.

No. 92–990. GREGORY, ADMINISTRATOR OF THE ESTATE OF GREGORY, ET AL. *v.* CITY OF ROGERS, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 974 F. 2d 1006.

No. 92-991. Kaubisch et al. *v.* South Dakota. Sup. Ct. S. D. Certiorari denied. Reported below: 490 N. W. 2d 726.

No. 92-992. Lewis, Personal Representative of the Estate of Lewis, Deceased, et al. *v.* United States Navy. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 726.

No. 92-993. McCue *v.* McCue, Personal Representative of the Estate of McCue, Deceased. Ct. App. Minn. Certiorari denied.

No. 92-997. McGunnigle *v.* Callahan, Superintendent, McNeil Island Corrections Center. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1340.

No. 92-998. Russell *v.* Board of Trustees of the Firemen, Policemen & Fire Alarm Operators' Pension Fund of Dallas, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 489.

No. 92-999. Sykora *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92-1000. Maldonado, Personal Representative of the Estate of Maldonado, Deceased *v.* Josey, Personal Representative of the Estate of Berry. C. A. 10th Cir. Certiorari denied. Reported below: 975 F. 2d 727.

No. 92-1001. Pacific Erectors, Inc., et al. *v.* Brinderson-Newberg Joint Venture et al. C. A. 9th Cir. Certiorari denied. Reported below: 971 F. 2d 272.

No. 92-1004. Cowhig *v.* Stone, Secretary of the Army, et al. C. A. 1st Cir. Certiorari denied. Reported below: 958 F. 2d 361.

No. 92-1006. Sprague et al. *v.* United States District Court for the Eastern District of Michigan (General Motors Corp., Real Party in Interest). C. A. 6th Cir. Certiorari denied.

No. 92-1007. Carlton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92–1009. Greater Anchorage, Inc. *v.* Nowell. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1342.

No. 92–1010. Deaton *v.* United States Department of Agriculture. C. A. Fed. Cir. Certiorari denied. Reported below: 979 F. 2d 217.

No. 92–1011. Winter *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 35 M. J. 93.

No. 92–1023. Morton *v.* Southern Union Co. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92–1024. Sexton et al. *v.* Vaughn et al. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 498.

No. 92–1025. Torres *v.* ASARCO, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 172.

No. 92–1026. City of Long Beach et al. *v.* George. C. A. 9th Cir. Certiorari denied. Reported below: 973 F. 2d 706.

No. 92–1027. Turner et ux. *v.* Ocean Nymph Shipping Co., Ltd., et al. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 171.

No. 92–1028. McLaren *v.* Imperial Casualty & Indemnity Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 17.

No. 92–1029. Skurnick *v.* Ainsworth. C. A. 11th Cir. Certiorari denied. Reported below: 960 F. 2d 939.

No. 92–1030. Diaz-Flores *v.* Immigration and Naturalization Service. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 730.

No. 92–1031. McKnight *v.* General Motors Corp. C. A. 7th Cir. Certiorari denied. Reported below: 973 F. 2d 1366.

No. 92–1032. Benasa Realty Co., t/a Wild Acres, et al. *v.* Mooney et al. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1551.

No. 92–1034. Seminole Electric Cooperative, Inc. *v.* Florida Department of Revenue et al. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 598 So. 2d 115.

No. 92–1035. SLAWEK ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1332.

No. 92–1036. MOORE *v.* BOARD OF EDUCATION OF FULTON PUBLIC SCHOOL No. 58. Sup. Ct. Mo. Certiorari denied. Reported below: 836 S. W. 2d 943.

No. 92–1038. WATERMAN STEAMSHIP CORP. ET AL. *v.* RAPHAELY INTERNATIONAL, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 972 F. 2d 498.

No. 92–1039. BOOKER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 28 Conn. App. 34, 611 A. 2d 878.

No. 92–1040. BARBER ET AL. *v.* HORSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1330.

No. 92–1044. DEFOOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1083.

No. 92–1045. MCCOLLUM *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 201 Ga. App. 493, 411 S. E. 2d 328.

No. 92–1049. KASSEL *v.* JARRETT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 1415.

No. 92–1054. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* JORDAN. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 539.

No. 92–1056. BRAY *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 122 Idaho 375, 834 P. 2d 892.

No. 92–1057. SIKES *v.* BANCBOSTON MORTGAGE CORP. C. A. 6th Cir. Certiorari denied. Reported below: 970 F. 2d 1556.

No. 92–1058. STRICKLAND ET AL. *v.* MOTORS INSURANCE CORP. C. A. 5th Cir. Certiorari denied. Reported below: 970 F. 2d 132.

No. 92–1059. BOESE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 592.

No. 92–1060. OSTERBROCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 348.

No. 92–1064. ANDERSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 736.

No. 92–1065. ROGERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 734.

No. 92–1068. CITY OF SOUTH SIOUX CITY, NEBRASKA *v.* SIOUX CITY FOUNDRY CO. C. A. 8th Cir. Certiorari denied. Reported below: 968 F. 2d 777.

No. 92–1071. BOZAROV *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1037.

No. 92–1072. WEAVER ET AL. *v.* STEGER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 970 F. 2d 1523.

No. 92–1073. CENTRAL GULF LINES, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 621.

No. 92–1075. GARNER *v.* COLORADO STATE DEPARTMENT OF PERSONNEL ET AL. Ct. App. Colo. Certiorari denied. Reported below: 835 P. 2d 527.

No. 92–1080. STEPHENSON *v.* MCLEAN CONTRACTING CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 574.

No. 92–1082. BLACK & DECKER, INC. *v.* ROSS. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 1178.

No. 92–1086. THOMAS *v.* CITY OF HOUSTON, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–1087. PERELLA *v.* COLONIAL TRANSIT, INC., AKA COLONIAL TAXI CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 569.

No. 92–1091. HOLDING *v.* BROTHERS ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–1092. DIVERSIFIED INVESTMENT PROPERTIES, INC., ET AL. *v.* HOMART DEVELOPMENT CO. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–1093. LEBBOS *v.* ARGUELLES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 737.

No. 92–1096. SIEU MEI TU ET AL. *v.* SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 591.

No. 92–1098. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 171.

No. 92–1100. NORTON *v.* ROSEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1079.

No. 92–1101. KIMBALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 975 F. 2d 563.

No. 92–1103. HENKEL CORP. *v.* TUCK. C. A. 4th Cir. Certiorari denied. Reported below: 973 F. 2d 371.

No. 92–1108. PERFORMANCE INDUSTRIES, INC. *v.* MORTON INTERNATIONAL, INC. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 569.

No. 92–1109. JOHNSTON ET VIR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1217.

No. 92–1111. CITY OF CINCINNATI ET AL. *v.* KUNTZ. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 79 Ohio App. 3d 86, 606 N. E. 2d 1028.

No. 92–1112. PELE DEFENSE FUND *v.* PATY, CHAIRMAN, BOARD OF LAND AND NATURAL RESOURCES OF HAWAII, ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 73 Haw. 578, 837 P. 2d 1247.

No. 92–1115. KRUEGER *v.* BOARD OF PROFESSIONAL DISCIPLINE OF THE IDAHO STATE BOARD OF MEDICINE. Sup. Ct. Idaho. Certiorari denied. Reported below: 122 Idaho 577, 836 P. 2d 523.

No. 92–1116. ORTIZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 151 Ill. 2d 1, 600 N. E. 2d 1153.

No. 92–1117. HALL *v.* CONWAY ET AL.; and
No. 92–1118. CAMOSCIO *v.* CONWAY ET AL. App. Ct. Mass. Certiorari denied. Reported below: 32 Mass. App. 1103, 585 N. E. 2d 764.

No. 92–1119. Larson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 586.

No. 92–1120. Brown et al. *v.* Independent School District No. I–06 of McCurtain County, Oklahoma (Haworth School District), et al. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1237.

No. 92–1121. Dever *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 401, 596 N. E. 2d 436.

No. 92–1122. Polyak *v.* Commissioner of Internal Revenue et al. C. A. 11th Cir. Certiorari denied.

No. 92–1124. Clarkson Puckle Group, Ltd., et al. *v.* International Insurance Co. et al. C. A. 7th Cir. Certiorari denied.

No. 92–1125. North by Northwest Civic Assn., Inc. *v.* City of Atlanta et al. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 531, 422 S. E. 2d 651.

No. 92–1126. Goodin *v.* Shalala, Secretary of Health and Human Services. C. A. 8th Cir. Certiorari denied. Reported below: 976 F. 2d 467.

No. 92–1132. Schwartz *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 213.

No. 92–1133. Lightfoot et al. *v.* Eu, Secretary of State of California. C. A. 9th Cir. Certiorari denied. Reported below: 964 F. 2d 865.

No. 92–1135. Griffin *v.* First National Bank of Crossett, Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 310 Ark. 164, 832 S. W. 2d 816.

No. 92–1136. Belanger *v.* Madera Unified School District et al. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 248.

No. 92–1137. Carroll *v.* Downs, Commissioner of Transportation of New Jersey, et al. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1548.

No. 92–1138. Karst *v.* Woods. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–1140. BROWNING ET AL. *v.* BOATMEN'S BANK OF BENTON ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 223 Ill. App. 3d 1117, 641 N. E. 2d 29.

No. 92–1141. HURD *v.* HURD. App. Ct. Mass. Certiorari denied. Reported below: 32 Mass. App. 1122, 595 N. E. 2d 811.

No. 92–1146. POWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 948 F. 2d 1297.

No. 92–1148. BARKLEY *v.* RKO PICTURES, INC. Ct. App. Okla. Certiorari denied. Reported below: 838 P. 2d 518.

No. 92–1152. WESTERN GAS RESOURCES, INC., SUCCESSOR IN INTEREST TO WESTERN GAS PROCESSORS, LTD. *v.* HEITKAMP, TAX COMMISSIONER OF NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 489 N. W. 2d 869.

No. 92–1153. PICKREL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–1154. O'HARA ET AL. *v.* KOVENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF KOVENS, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 92 Md. App. 9, 606 A. 2d 286.

No. 92–1155. INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS ET AL. *v.* MILLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 973 F. 2d 1348.

No. 92–1160. WARD *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 584.

No. 92–1161. SKUBAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 955 F. 2d 1527.

No. 92–1162. 9221 ASSOCIATES ET AL. *v.* INDUSTRIAL STATE BANK. C. A. 8th Cir. Certiorari denied. Reported below: 973 F. 2d 671.

No. 92–1167. BUSH *v.* ZEELAND PUBLIC SCHOOLS ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 439 Mich. 991, 483 N. W. 2d 876.

No. 92–1171. MCLINN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 923.

No. 92–1172. Span et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 970 F. 2d 573.

No. 92–1174. Schneiderman et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 1564.

No. 92–1175. Grosz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 577.

No. 92–1185. Navarro *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 705.

No. 92–1193. Walgren *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–1197. Konigsberg *v.* Kuhlmann, Warden. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 706.

No. 92–1198. Matyastik *v.* Texas. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 92–1200. Sun Communications, Inc. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 303, 971 F. 2d 766.

No. 92–1201. Armstrong World Industries, Inc. *v.* Fineman et al. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 171.

No. 92–1204. Milam *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92–1226. Goland *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1347.

No. 92–5568. Jones *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 833 S. W. 2d 118.

No. 92–5603. Coble *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 954 F. 2d 727.

No. 92–5743. Dawson *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 112, 825 P. 2d 593.

No. 92–5818. Padilla *v.* Ignacio, Warden, et al. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 1247, 872 P. 2d 829.

No. 92–5896. DEBERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 1447.

No. 92–5907. BETKA *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 376.

No. 92–5992. JANES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 680.

No. 92–6013. LUCKETT *v.* JETT, DIRECTOR, ILLINOIS DEPARTMENT OF HUMAN RIGHTS. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 209.

No. 92–6032. WASHINGTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 73, 969 F. 2d 1073.

No. 92–6037. HERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 885.

No. 92–6054. VILLARRUBIA *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6061. PEDROZA-DIAZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 352.

No. 92–6106. HALBERT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 80 N. Y. 2d 865, 600 N. E. 2d 618.

No. 92–6141. DOLFI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 900.

No. 92–6160. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 968 F. 2d 1219.

No. 92–6186. EVANS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 970 F. 2d 663.

No. 92–6264. UHLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 381.

No. 92–6277. ALI-KANDIEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–6278. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 973 F. 2d 1509.

No. 92–6327. NICKERSON *v.* LEE, SUPERINTENDENT, ROCKINGHAM CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 971 F. 2d 1125.

No. 92–6331. DAVIS *v.* BENTSEN, SECRETARY OF THE TREASURY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1082.

No. 92–6337. STRICKLAND *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 596 So. 2d 1155.

No. 92–6340. DAVERN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 970 F. 2d 1490.

No. 92–6345. MONTERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–6353. SILVERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1082.

No. 92–6409. DISCHNER *v.* UNITED STATES; and
No. 92–6802. MATHISEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1502.

No. 92–6410. CRANK *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied. Reported below: 969 F. 2d 363.

No. 92–6427. COWAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1344.

No. 92–6448. GILES *v.* HOTEL OAKLAND ASSOCIATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 586.

No. 92–6459. SELLAND *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 966 F. 2d 346.

No. 92–6461. BEALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 970 F. 2d 343.

No. 92–6472. OJEBODE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 957 F. 2d 1218.

No. 92–6474. LEGER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 149 Ill. 2d 355, 597 N. E. 2d 586.

No. 92-6480. KESNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92-6500. HOLM *v.* UNITED STATES; and
No. 92-6574. LAFLEUR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 971 F. 2d 200.

No. 92-6509. SASSER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 971 F. 2d 470.

No. 92-6521. BLOUNT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 974 F. 2d 1340.

No. 92-6530. GRIFFIN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 45, 592 N. E. 2d 930.

No. 92-6570. WEAVER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1446.

No. 92-6572. DILL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 600 So. 2d 372.

No. 92-6587. TRAN VAN KHIEM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 612 A. 2d 160.

No. 92-6594. HILL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 331 N. C. 387, 417 S. E. 2d 765.

No. 92-6595. GRANT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 967 F. 2d 81.

No. 92-6597. GAUDET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 959.

No. 92-6605. MEEK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1346.

No. 92-6611. WHITSON *v.* CITY OF URBANDALE, IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 491 N. W. 2d 543.

No. 92-6617. TARANGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 924.

No. 92-6620. WILLIAMS *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 1178.

No. 92–6641. WOOD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1349.

No. 92–6668. GILES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 385.

No. 92–6669. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 23.

No. 92–6672. USELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 1339.

No. 92–6688. HAMPTON *v.* KEAL DRIVEAWAY CO. ET AL. C. A. 4th Cir. Certiorari denied.

No. 92–6699. RUSSELL *v.* RUNYON, POSTMASTER GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 971 F. 2d 744.

No. 92–6704. BAKER *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 97, 976 F. 2d 45.

No. 92–6710. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–6715. ANDERSON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 975 F. 2d 868.

No. 92–6718. SPYCHALA *v.* MEYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–6720. HAIGHT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 833 S. W. 2d 821.

No. 92–6721. HANEY *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 603 So. 2d 412.

No. 92–6723. HALVERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 654.

No. 92–6725. JONES *v.* CONTINENTAL BONDWARE. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 351.

No. 92–6728. SMITH *v.* STOTLER, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1342.

No. 92-6741. HARVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 175.

No. 92-6743. FRANKLIN *v.* NATIONAL MARITIME UNION OF AMERICA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1331.

No. 92-6745. KNIGHT *v.* WALKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 970 F. 2d 1430.

No. 92-6748. ANGELETAKIS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 5 Cal. App. 4th 963, 7 Cal. Rptr. 2d 377.

No. 92-6749. CROSS *v.* SHELTON. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92-6750. ADAMS *v.* CARR, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 740.

No. 92-6752. MONTGOMERY *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 743.

No. 92-6753. PORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1346.

No. 92-6758. LANDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 594 and 968 F. 2d 907.

No. 92-6759. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1332.

No. 92-6761. TINSLEY *v.* WILLIAMS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92-6762. GUY *v.* WESTMORELAND COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 568.

No. 92-6763. WHITE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92-6764. JACKSON *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 976 F. 2d 747.

No. 92-6766. Battle *v.* Barton et al. C. A. 11th Cir. Certiorari denied. Reported below: 970 F. 2d 779.

No. 92-6769. Swig *v.* Jones et al. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 591.

No. 92-6772. McMiller *v.* Borgert, Warden. C. A. 6th Cir. Certiorari denied.

No. 92-6773. Lewis *v.* American Airlines et al. C. A. 7th Cir. Certiorari denied.

No. 92-6774. Shaw *v.* Delo, Superintendent, Missouri State Correctional Facility at Potosi, et al. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 181.

No. 92-6779. Schrader *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92-6782. Moore *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 92-6783. Lightfoot *v.* Town of Fairfield, Maine. Sup. Jud. Ct. Me. Certiorari denied.

No. 92-6785. Battle *v.* McDade, Superintendent, Eastern Correctional Institution, et al. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 571.

No. 92-6788. Plath *v.* South Carolina; and
No. 92-6804. Arnold *v.* South Carolina. Sup. Ct. S. C. Certiorari denied. Reported below: 309 S. C. 157, 420 S. E. 2d 834.

No. 92-6790. Key *v.* Washington et al. Sup. Ct. Wash. Certiorari denied. Reported below: 119 Wash. 2d 600, 836 P. 2d 200.

No. 92-6791. Ellis *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 92-6793. Herrera *v.* Miller. C. A. 9th Cir. Certiorari denied.

No. 92-6794. Vereen *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 679.

No. 92–6795. VANSKIKE *v.* PETERS. C. A. 7th Cir. Certiorari denied. Reported below: 974 F. 2d 806.

No. 92–6797. WHITAKER *v.* FOR EYES ET AL.; and WHITAKER *v.* ALAMEDA COUNTY SUPERIOR COURT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–6798. WILKERSON *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1348.

No. 92–6801. DICK *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 963 F. 2d 375.

No. 92–6803. SMITH *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1343.

No. 92–6808. JAMES *v.* ARIZONA. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 92–6810. SERRANO REYES ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–6812. ECHOLS *v.* AMERICAN FORK INVESTORS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1345.

No. 92–6814. PONCE-BRAN *v.* WILSON, GOVERNOR OF CALIFORNIA, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 92–6817. BOYD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6819. CRENSHAW *v.* OHIO DEPARTMENT OF HUMAN SERVICES. Sup. Ct. Ohio. Certiorari denied. Reported below: 62 Ohio St. 3d 1506, 583 N. E. 2d 1318.

No. 92–6824. SMITH *v.* KLINCAR, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 352.

No. 92–6828. WASHBURN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–6829. HESTER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 204 Ga. App. 552, 420 S. E. 2d 23.

No. 92–6831. PROVOST *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 490 N. W. 2d 93.

No. 92–6834. EDWARDS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1346.

No. 92–6840. MARSHALL *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 123 N. J. 1, 586 A. 2d 85, and 130 N. J. 109, 613 A. 2d 1059.

No. 92–6841. THIGPEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 597.

No. 92–6842. STEVENS *v.* ZANT, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 1076.

No. 92–6843. SITTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 947.

No. 92–6844. DUVALL *v.* DUVALL ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–6845. DEMOS *v.* KING COUNTY SUPERIOR COURT ET AL. Sup. Ct. Wash. Certiorari denied.

No. 92–6848. WILLIAMS ET UX. *v.* SEEBER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 345.

No. 92–6857. FAGLIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 172.

No. 92–6858. HAKIM *v.* MIELE. Super. Ct. N. H., Hillsborough County. Certiorari denied.

No. 92–6859. HECK *v.* RICHARDS, SUPERINTENDENT, WESTVILLE CORRECTIONAL CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 976 F. 2d 735.

No. 92–6860. HORTON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–6861. JONES *v.* JONES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1340.

No. 92–6862. GREEN ET AL. *v.* CHATHAM COUNTY, GEORGIA. Ct. App. Ga. Certiorari denied.

No. 92–6865. PEABODY *v.* ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1341.

No. 92–6867. MCCRAY *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 341.

No. 92–6869. LAFLAMME *v.* SPECTOR ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–6870. RYMAN *v.* GALLEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 341.

No. 92–6871. RYMAN *v.* GALLEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 341.

No. 92–6872. DARLING ET AL. *v.* CITY OF BEAUMONT ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–6875. FERREIRA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6879. BILLINGS ET UX. *v.* DOLAN, ACTING COMMISSIONER, INTERNAL REVENUE SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 1338.

No. 92–6881. CAIN *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 748.

No. 92–6883. MINNIS *v.* BALDWIN. Sup. Ct. Pa. Certiorari denied.

No. 92–6884. LUCIEN *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 980 F. 2d 733.

No. 92–6885. MURPHY *v.* DOWD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 435.

No. 92–6887. MOHIUDDIN *v.* STATE DEPARTMENT OF INDUSTRIAL RELATIONS ET AL. Sup. Ct. Ala. Certiorari denied.

No. 92–6892. SHELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 734.

No. 92–6893. HOLBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1334.

No. 92–6896. GOUGH *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 65 Ohio St. 3d 1441, 600 N. E. 2d 683.

No. 92–6897. ROBERTSON *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 92–6898. NELSON *v.* CITY OF TUSCALOOSA ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 602 So. 2d 913.

No. 92–6900. CAMPBELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 963 F. 2d 373.

No. 92–6901. BUCHANAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6902. DOBROVA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1222.

No. 92–6903. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 213.

No. 92–6905. OKEN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 327 Md. 628, 612 A. 2d 258.

No. 92–6906. TURNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1348.

No. 92–6909. HAFFORD *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 828 S. W. 2d 275.

No. 92–6912. BLALOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–6913. SEMENAK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 857.

No. 92–6914. CHAVEZ *v.* MERCED COUNTY HUMAN SERVICES AGENCY. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 92–6915. VEGA-PENARETE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1333.

No. 92–6916. TURNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 739.

No. 92–6918. SEAGRAVE *v.* GOMEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1343.

No. 92–6919. WHITAKER *v.* ALAMEDA COUNTY SUPERIOR COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1348.

No. 92–6920. SEAGRAVE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–6922. WARNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 975 F. 2d 1207.

No. 92–6923. GARDNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 975 F. 2d 1225.

No. 92–6924. GUTIERREZ-MEDEROS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 965 F. 2d 800.

No. 92–6925. FOWLER *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–6926. HERMAN *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 931 F. 2d 60.

No. 92–6927. SMITH *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 867.

No. 92–6928. WATSON *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–6929. WOLFENBARGER *v.* LOVE, JUDGE, ET AL.; and WOLFENBARGER *v.* COURT OF APPEALS OF KANSAS ET AL. C. A. 10th Cir. Certiorari denied.

No. 92–6930. STEVENS *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 15.

No. 92–6932. DICKERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 975 F. 2d 1245.

No. 92–6933. ALVAREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 705.

No. 92–6935. LEWIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1348.

No. 92–6937. PURNELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1346.

No. 92–6938. LAWRENCE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 184 App. Div. 2d 586, 584 N. Y. S. 2d 641.

No. 92–6939. ABNER *v.* ESCAMBIA COUNTY SCHOOL DISTRICT. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 756.

No. 92–6940. YOUNG *v.* NORTH CAROLINA. Super. Ct. N. C., Wake County. Certiorari denied.

No. 92–6943. RODRIGUEZ *v.* KINCHELOE. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 590.

No. 92–6946. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1347.

No. 92–6947. ENGLAND *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92–6948. GOODWIN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–6950. CANO-PENA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 740.

No. 92–6951. CARLYLE *v.* TRIGG, SUPERINTENDENT, INDIANA YOUTH CENTER. C. A. 7th Cir. Certiorari denied.

No. 92–6952. LACKEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–6954. SATCHER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 244 Va. 220, 421 S. E. 2d 821.

No. 92–6955. DULANEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 583.

No. 92–6956. LOCADIA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 92–6958. BIRKHOLZ *v.* RACICOT, ATTORNEY GENERAL OF MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 255 Mont. 538, 843 P. 2d 798.

No. 92–6959. GRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1332.

No. 92–6961. RUIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1347.

No. 92–6963. DURLING *v.* CHAIRMAN, MASSACHUSETTS PAROLE BOARD ET AL. C. A. 1st Cir. Certiorari denied.

No. 92–6964. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 25.

No. 92–6965. MYLO *v.* BOARD OF EDUCATION OF BALTIMORE COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 948 F. 2d 1282.

No. 92–6966. MOSES *v.* CARNES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 851.

No. 92–6967. PRENZLER *v.* KLEINMAN. C. A. 9th Cir. Certiorari denied.

No. 92–6968. LYLE *v.* SAGINAW CIRCUIT JUDGE ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 440 Mich. 897, 488 N. W. 2d 749.

No. 92–6969. ARAFILES *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 6 Cal. App. 4th 1467, 8 Cal. Rptr. 2d 492.

No. 92–6970. FARLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 734.

No. 92–6972. GOODMAN *v.* GOODMAN. Super. Ct. Dougherty County, Ga. Certiorari denied.

No. 92–6974. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1349.

No. 92–6975. HOLMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 975 F. 2d 275.

No. 92–6976. BURNS *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 92–6978. FIELDS *v.* CITY OF WEST PALM BEACH, FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 92-6980. Brookins *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 531 Pa. 397, 613 A. 2d 554.

No. 92-6985. Allen *v.* Leimbach. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 912.

No. 92-6986. Sultry *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 141, 976 F. 2d 1445.

No. 92-6990. Powers *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 354.

No. 92-6991. Bethley *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 396.

No. 92-6992. Overshown *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92-6993. Pride *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 195, 833 P. 2d 643.

No. 92-6994. Larkin *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 964.

No. 92-6995. Moore *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 608 A. 2d 144.

No. 92-6996. Franklin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 92-6997. Holden *v.* Briggs, Superintendent, Cook Inlet Pre-Trial Facility, et al. C. A. 9th Cir. Certiorari denied.

No. 92-6998. Hernandez-Ruiz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 92-6999. Grey *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 92-7000. Evans *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1348.

No. 92-7001. Henry et ux. *v.* Otis Engineering Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92–7002. JOHNSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–7003. DICESARE *v.* WALKER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1345.

No. 92–7004. ESTUS *v.* LYNN. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 722.

No. 92–7005. FRANKLIN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92–7006. MCGEE ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 588.

No. 92–7007. SIMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 974 F. 2d 845.

No. 92–7010. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 243.

No. 92–7011. PURDY *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 510.

No. 92–7013. MAXWELL *v.* BEYER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 568.

No. 92–7014. MURPHY *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1345.

No. 92–7015. WHITE *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 833 S. W. 2d 339.

No. 92–7016. RYMAN *v.* PYLES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 727.

No. 92–7017. WARDEN *v.* PERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 575.

No. 92–7018. BENTLEY *v.* SCULLY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 706.

No. 92–7022. NORTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 355.

No. 92–7023. HUNT *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 581.

No. 92–7024. INGALLS *v.* FIREHOUSE BREWING CO., INC. Ct. App. Ariz. Certiorari denied.

No. 92–7027. FERDIK *v.* WOODS, ATTORNEY GENERAL OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 585.

No. 92–7028. DE LOS SANTOS *v.* BORG, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 92–7029. THOMAS *v.* MCCORMICK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 591.

No. 92–7030. NORRIS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 589 N. E. 2d 1208.

No. 92–7031. SPANO *v.* MCAVOY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 845.

No. 92–7032. SPANO *v.* MCAVOY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 846.

No. 92–7033. LITVIN *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 605 So. 2d 85.

No. 92–7034. STRATTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 739.

No. 92–7035. STOKES *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–7036. BERNARD *v.* GARRAGHTY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1330.

No. 92–7037. HAMMOND *v.* DEPARTMENT OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 730.

No. 92–7038. Schaefer *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 743.

No. 92–7040. Carter *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 218, 594 N. E. 2d 595.

No. 92–7044. Stanton *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 479.

No. 92–7045. Williams *v.* Grayson, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 584.

No. 92–7046. Chimal *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 608.

No. 92–7047. Bryant *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1260.

No. 92–7048. Campbell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 854.

No. 92–7050. Smith *v.* Lockhart, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1264.

No. 92–7051. Brown *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 92–7052. Baugh *v.* Arkansas. Ct. App. Ark. Certiorari denied. Reported below: 39 Ark. App. xiii.

No. 92–7053. Bryson *v.* Bessinger, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 725.

No. 92–7054. Blackmon *v.* McMackin, Warden. C. A. 6th Cir. Certiorari denied.

No. 92–7055. York *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 1339.

No. 92–7056. Whigham *v.* Filene's Department Store et al. C. A. 1st Cir. Certiorari denied. Reported below: 974 F. 2d 1329.

No. 92–7057. Seibert *v.* Delo et al. C. A. 8th Cir. Certiorari denied.

No. 92–7058. SOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 707.

No. 92–7059. MARTINEZ-CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 92–7060. LORENTSEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 739.

No. 92–7061. MACINNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92–7062. REED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 584.

No. 92–7063. HEAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1345.

No. 92–7065. HANNAH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 742.

No. 92–7068. GONZALES *v.* TEXAS. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 831 S. W. 2d 345.

No. 92–7069. DURLING *v.* JUSTICES OF THE TAUNTON DISTRICT COURT ET AL. C. A. 1st Cir. Certiorari denied.

No. 92–7071. KATSAKIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 734.

No. 92–7072. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 105.

No. 92–7073. FICKLIN *v.* BORG, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 92–7074. HUBBARD *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 92–7075. CRAWFORD *v.* COPELAND ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 926.

No. 92–7076. HARVEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1345.

No. 92–7077. DAVIS *v.* MUNCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 733.

No. 92–7078. GIBSON *v.* GRAMLEY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1261.

No. 92–7079. GREEN *v.* DORRELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 969 F. 2d 915.

No. 92–7082. BLALOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 342.

No. 92–7083. RUEBEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 580.

No. 92–7085. O'KEEFE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 855.

No. 92–7086. MARSHAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–7087. NAMER *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied.

No. 92–7088. LOWERY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 742.

No. 92–7090. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 355.

No. 92–7091. BERRY *v.* GRIFFITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1572.

No. 92–7092. SOUTHERLAND *v.* SOUTHERLAND. Ct. App. Ga. Certiorari denied.

No. 92–7093. ARENAS-QUINTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 591.

No. 92–7094. BLOCK *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 979 F. 2d 217.

No. 92–7095. TERRY *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 974 F. 2d 372.

No. 92–7096. REMOI *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 130 N. J. 601, 617 A. 2d 1223.

No. 92–7097. ROCHA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 593.

No. 92–7098. LEE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 65 Ohio St. 3d 1415, 598 N. E. 2d 1167.

No. 92–7100. RAMAGE ET AL. *v.* CLINTON STATE BANK. C. A. 8th Cir. Certiorari denied.

No. 92–7101. OLIVER *v.* LAMBDIN, SUPERINTENDENT, GLADES CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied.

No. 92–7102. ALSWORTH *v.* TERRY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 966 F. 2d 1441.

No. 92–7103. JOHNSON *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 79 Ohio App. 3d 343, 607 N. E. 2d 475.

No. 92–7105. ESPINOZA-BARRAGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 592.

No. 92–7106. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 593.

No. 92–7107. HADLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 592.

No. 92–7108. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 331.

No. 92–7109. KIDD *v.* JOHNSON. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 174.

No. 92–7110. CABRET *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1347.

No. 92–7111. BRYANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–7112. ZIEGLER *v.* KAISER, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7113. MCCRAY *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 92–7114. NEYLAND *v.* TOLEDO BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 734.

No. 92–7115. MCAFEE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–7116. MCCANN *v.* ARMONTROUT, ASSISTANT DIRECTOR/ZONE II, MISSOURI DIVISION OF ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 973 F. 2d 655.

No. 92–7119. MACKEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 597.

No. 92–7121. WHITTINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 170.

No. 92–7122. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 866.

No. 92–7125. DECHIRICO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 185 App. Div. 2d 282, 586 N. Y. S. 2d 25.

No. 92–7126. AGUIRRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92–7132. SAUCEDO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 597.

No. 92–7133. SIMMAT *v.* QUINLAN, DIRECTOR, FEDERAL BUREAU OF PRISONS. C. A. D. C. Cir. Certiorari denied.

No. 92–7136. WILLIAMS *v.* DEADERICK. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 706.

No. 92–7137. LINDSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 958 F. 2d 1084.

No. 92–7138. MARKARIAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 967 F. 2d 1098.

No. 92–7140. MOORE *v.* HALE, CHAIRMAN, TEXAS BOARD OF CRIMINAL JUSTICE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92-7141. McCRARY EL *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 92-7144. KELLEY ET AL. *v.* GONZALEZ ET AL. C. A. 3d Cir. Certiorari denied.

No. 92-7146. HARTSFIELD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 1349.

No. 92-7147. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92-7151. CLEVY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 734.

No. 92-7152. SIMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 979 F. 2d 1282.

No. 92-7156. SALAMA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 520.

No. 92-7157. RENDELMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1260.

No. 92-7160. RANDLE *v.* RUNYON, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 354.

No. 92-7163. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 975 F. 2d 159.

No. 92-7165. FIGUEROA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 976 F. 2d 1446.

No. 92-7167. ENGLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 583.

No. 92-7169. LARSON *v.* NORTH DAKOTA ET AL. Sup. Ct. N. D. Certiorari denied.

No. 92-7173. MOORE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 92-7174. QUINONES *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTIONS. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 707.

No. 92–7175. DeShields *v.* Love, Superintendent, State Correctional Institution at Huntingdon. C. A. 3d Cir. Certiorari denied.

No. 92–7177. Crumbley *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1538.

No. 92–7179. Bell Bey *v.* Brown et al. C. A. 6th Cir. Certiorari denied. Reported below: 980 F. 2d 729.

No. 92–7180. Cammack *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 583.

No. 92–7183. Tonwe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 726.

No. 92–7189. Quesada *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 281.

No. 92–7190. Olson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 593.

No. 92–7191. Richardson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 586.

No. 92–7192. Moody *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 1420.

No. 92–7194. Sullivan *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 92–7197. Reigle *v.* United States. Ct. App. D. C. Certiorari denied.

No. 92–7204. Bannerman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1332.

No. 92–7205. Smith *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 952.

No. 92–7206. Harrill *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1534.

No. 92–7207. James *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 578.

No. 92–7208. Castro *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1107.

No. 92–7211. Villarreal *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 1077.

No. 92–7215. Klang *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 599.

No. 92–7216. Medrano-Veloja *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 500.

No. 92–7219. Linne *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1332.

No. 92–7220. Mitchell *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–7227. Reid *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 976 F. 2d 446.

No. 92–7232. Horton *v.* Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 170 Wis. 2d 732, 492 N. W. 2d 190.

No. 92–7239. DeNardo *v.* Municipality of Anchorage. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1200.

No. 92–7246. Bowden *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 975 F. 2d 1080.

No. 92–7248. Harding *v.* Maryland. Cir. Ct. Baltimore City, Md. Certiorari denied.

No. 92–7253. Wilson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 514.

No. 92–7257. Ellis et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 975 F. 2d 1061.

No. 92–7259. Richards *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1341.

No. 92–7261. Raley *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 870, 830 P. 2d 712.

No. 92–7262. Velez-Ortiz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 594.

No. 92–7265. Scott *v.* Indeterminate Sentence Review Board for Washington. C. A. 9th Cir. Certiorari denied.

No. 92–7267. Gravelle *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 586.

No. 92–7273. Ramirez-Collazo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 578.

No. 92–7275. Severino *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 598.

No. 92–7285. Peery *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 1230.

No. 92–7289. Shuler *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 852.

No. 92–7290. Berry *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92–7291. Smith *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1447.

No. 92–7293. Williams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 721.

No. 92–7294. Treadwell *v.* United States; and
No. 92–7297. Treadwell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 574.

No. 92–7299. Hodges *v.* Georgia Department of Corrections et al. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 743.

No. 92–7303. Dowler *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1268.

No. 92–7304. Sasser *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–7305. Whitehead *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 720.

No. 92–7306. Bradley *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 1422.

No. 92–7308. Novene *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1260.

No. 92–7316. Nikrasch *v.* United States; and
No. 92–7325. Kelly *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 593.

No. 92–7322. Frye *v.* Rommell, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1267.

No. 92–7323. Hall *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 77.

No. 92–7326. Gaviria *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 709.

No. 92–7327. Cook *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1256.

No. 92–7329. Johnson, aka O'Neal *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 1297.

No. 92–7330. Holland *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 1042.

No. 92–7331. Hernandez *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 574.

No. 92–7332. Horton *v.* Singletary, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 92–7346. Dawkins *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 710.

No. 92–7351. Montoya *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 92–7354. Ard *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 721.

No. 91–32. Sorbothane, Inc., et al. *v.* McQuillan et vir, dba Sorboturf Enterprises. C. A. 9th Cir. Motion of petitioners for summary reversal denied. Certiorari denied. Reported below: 907 F. 2d 154.

No. 92–379. ILLINOIS *v.* CONDON. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 96, 592 N. E. 2d 951.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The State of Illinois, petitioner here, seeks review of a judgment of the Illinois Supreme Court holding that a police search of respondent's home, conducted pursuant to a warrant, was unconstitutional because the police failed to knock and announce their presence before entering the premises. Because the decision below is in conflict with those of other courts on the question of what showing police must make to dispense with the ordinary knock-and-announce requirement in executing search warrants, I would grant certiorari.

Based on information provided by informants, police in Du Page County, Illinois, obtained a warrant to search respondent's home. Police had been told by the informants that respondent had been using the residence as a base for cocaine distribution, that residents of the house monitored approaching traffic with closed-circuit surveillance cameras and a police scanner, and that several weapons were kept inside the house. The police also knew that the house was owned by respondent's brother, whom they previously had arrested on drugs and weapons charges and who was then a fugitive.

On the evening of November 6, 1987, a team of police officers executed the warrant. They stormed respondent's home without knocking or announcing their presence and arrested respondent. A search of the home revealed cocaine, marijuana, 13 guns, and marked currency obtained through drug transactions orchestrated by police earlier that day.

At his subsequent trial, respondent contended that the search was constitutionally invalid under the Fourth Amendment because police did not knock and announce their presence before entering his home. The trial court denied respondent's suppression motion, finding that exigent circumstances justified the unannounced entry. Respondent was thereafter convicted on several counts. On appeal, the State Appellate Court reversed respondent's conviction and the Illinois Supreme Court affirmed, holding that the facts did not demonstrate exigent circumstances sufficient to dispense with the knock-and-announce requirement. 148 Ill. 2d 96, 592 N. E. 2d 951 (1992). In so holding, the court turned aside each of the four circumstances proffered by the State as justifying the unannounced entry: the presence of cocaine in the house and the ease with which it could be destroyed, the existence of surveillance cameras and a police scanner, the presence of weapons in the house, and the fact that respondent's brother had been carrying a loaded pistol at the time of his earlier arrest on drug charges. *Id.*, at 103–106, 592 N. E. 2d, at 955–956. The court also rejected the State's contention that these circumstances should be considered collectively in determining whether the unannounced entry was justified. *Id.*, at 106, 592 N. E. 2d, at 956.

The decision below is in conflict with those of other courts holding that similar factual showings demonstrate "exigent circumstances" justifying an unannounced entry. See, *e. g., United States* v. *Keene*, 915 F. 2d 1164, 1168–1169 (CA8 1990) (fact that narcotics on premises could have been quickly destroyed justified unannounced entry), cert. denied, 498 U. S. 1102 (1991); *State* v. *Matos*, 135 N. H. 410, 411, 605 A. 2d 223, 224 (1992) (same); *State* v. *Williams*, 168 Wis. 2d 970, 985–986, 485 N. W. 2d 42, 48 (1992) (combined presence of drugs and guns on premises justified unannounced entry). The state courts are particularly divided over whether the presence of illegal drugs alone will justify unannounced police entry on the theory that pausing to announce the search will enable the destruction of evidence. See *United States* v. *Moore*, 956 F. 2d 843, 849–850, and n. 9 (CA8 1992) (acknowledging split of authority and collecting cases); *Matos, supra,* at 412, 605 A. 2d, at 224 (same).

Although there are perhaps prudential reasons counseling against plenary review in this case, I would grant certiorari to resolve the conflict.

No. 92–640. COLORADO TAXPAYERS UNION, INC., ET AL. *v.* ROMER, GOVERNOR OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 963 F. 2d 1394.

No. 92–929. METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA *v.* DAVILA, ASSISTANT SECRETARY, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, UNITED STATES DEPARTMENT OF EDUCATION. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 969 F. 2d 485.

No. 92–6196. DAVIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 972 F. 2d 227.

No. 92–798. ENVIRONMENTAL PROTECTION AGENCY *v.* COALITION FOR CLEAN AIR ET AL.; and

No. 92–1014. SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS *v.* COALITION FOR CLEAN AIR ET AL. C. A. 9th Cir. Motion of Los Angeles Area Chamber of Commerce for leave to file a brief as *amicus curiae* in No. 92–798 granted. Certiorari denied. Reported below: 971 F. 2d 219.

No. 92–800. NATIONAL AGRICULTURAL CHEMICALS ASSN. *v.* LES ET AL. C. A. 9th Cir. Motions of Washington Legal Foundation, American Farm Bureau Federation, American Soybean Association et al., and Grocery Manufacturers of America et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 968 F. 2d 985.

No. 92–830. PENNSYLVANIA *v.* DANIELS. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 410 Pa. Super. 275, 599 A. 2d 988.

No. 92–914. KASSULKE, WARDEN, ET AL. *v.* FOSTER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 972 F. 2d 347.

No. 92–931. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF OFFENDER REHABILITATION, ET AL. *v.* MEEKS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 963 F. 2d 316.

No. 92–1002. CHICAGO HOUSING AUTHORITY *v.* HUNT. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 972 F. 2d 351.

No. 92–1018. ESPOSITO, WARDEN *v.* HOUSTON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 968 F. 2d 23.

No. 92–1041. TRIGG, SUPERINTENDENT, INDIANA YOUTH CENTER *v.* FORBES. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 976 F. 2d 308.

No. 92–1128. BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY *v.* KWAN FAI MAK. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 970 F. 2d 614 and 972 F. 2d 1340.

No. 92–848. AMERITECH CORP. ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL.; and

No. 92–879. BELLSOUTH CORP. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 297 U. S. App. D. C. 231, 969 F. 2d 1231.

No. 92–6265. DOCK *v.* AMERICAN TELEPHONE & TELEGRAPH TECHNOLOGIES ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 92–906. MOORE ET AL. *v.* CALIFORNIA STATE BOARD OF ACCOUNTANCY. Sup. Ct. Cal. Motions of NSPA Affiliated State Organizations, National Society of Public Accountants, California Society of Enrolled Agents, and Center for Public Interest Law for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 2 Cal. 4th 999, 831 P. 2d 798.

No. 92–927. PRECISION CO. *v.* KOCH INDUSTRIES, INC., ET AL. C. A. 10th Cir. Motion of Council of Energy Resource Tribes et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 971 F. 2d 548.

No. 92–1016. FUQUA *v.* UNITED STATES. Ct. Mil. App. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 36 M. J. 374.

No. 92–1017. MCGUINESS *v.* UNITED STATES. Ct. Mil. App. Motion of petitoner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 35 M. J. 149.

No. 92–1022. CHATTIN *v.* UNITED STATES. Ct. Mil. App. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 36 M. J. 374.

No. 92–1078. BOUDREAUX *v.* UNITED STATES. Ct. Mil. App. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 35 M. J. 291.

No. 92–1079. BUCKLEY *v.* UNITED STATES. Ct. Mil. App. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 35 M. J. 262.

No. 92–6863. DOWELL *v.* HOLLINGSWORTH ET AL. C. A. 5th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 92–7158. MERCER *v.* UNITED STATES. Ct. App. D. C. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 92–1037. MILLER *v.* INDIANA HOSPITAL ET AL. C. A. 3d Cir. Motions of Virginia Ray et al. and Semmelweis Society for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 975 F. 2d 1550.

No. 92–1046. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA *v.* CAMP, TRUSTEE, SECURITIES INVESTOR PROTECTION CORP. C. A. 11th Cir. Motions of American Insurance Association and Surety Association of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 972 F. 2d 328.

No. 92–1053. NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (COLPA) *v.* RAN-DAV'S COUNTY KOSHER, INC., ET AL. Sup. Ct. N. J. Motion of New Jersey Association of Reform Rabbis et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 129 N. J. 141, 608 A. 2d 1353.

No. 92–1107. HOLMES ET AL. *v.* TAYLOR ET UX. C. A. 5th Cir. Motions of Maritime Law Association of the United States and American Institute of Marine Underwriters for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 972 F. 2d 666.

No. 92–6425. POLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 970 F. 2d 1280.

No. 92–6455. SEWELL *v.* UNITED STATES;

No. 92–6484. SHERROD *v.* UNITED STATES; and

No. 92–6591. SEWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1501.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These petitions raise yet again the question whether waste byproducts that are not ingestible or marketable may be included in calculating the weight of a "mixture or substance containing a detectable amount of . . . methamphetamine" for purposes of § 2D1.1 of the United States Sentencing Commission, Guidelines Manual (Nov. 1991). The Circuits are deeply split on this issue. As I noted in *Walker* v. *United States,* 506 U. S. 967, 968 (1992), the Courts of Appeals for the Second, Third, and Ninth Circuits have joined the Sixth and Eleventh Circuits in adopting an approach consistent with that urged by petitioners. By contrast, the Court of Appeals for the Fifth Circuit, joined by the First and Tenth Circuits, has adopted a contrary approach. *Ibid.* In the decision below, the Court of Appeals for the Fifth Circuit adhered to this position, reaffirming its disagreement with the holding of the Sixth Circuit in *United States* v. *Jennings,* 945 F. 2d 129 (CA6 1991), and recognizing inconsistency with approaches adopted by the Second and Eleventh Circuits. *United States* v. *Sherrod,* 964 F. 2d 1501, 1509–1511, and n. 22 (CA5 1992). The conflict is enduring and the issue important. As a result of the conflict, those convicted of violating federal law are subject to widely disparate sentences, depending only on the federal circuit in which their cases are brought. The issue is a recurring one. Respondent concedes that the Circuits are in conflict, but notes that it did not oppose certiorari in *United States* v. *Mahecha-Onofre,* 936 F. 2d 623 (CA1), and this Court nonetheless denied review there, 502 U. S. 1009 (1991), and since has denied review of the issue four more times. Respondent is correct. See *Cooper* v. *United States,* 506 U. S. 1041 (1992) (WHITE and BLACKMUN, JJ., dissenting from denial of certiorari); *Walker* v. *United States, supra* (WHITE and BLACKMUN, JJ., dissenting from denial of certiorari); *Fowner*

v. *United States*, 504 U. S. 933 (1992) (WHITE, J., dissenting from denial of certiorari); *Beltran-Felix* v. *United States*, 502 U. S. 1065 (1992) (WHITE, J., dissenting from denial of certiorari). This marks the sixth time this issue has come before the Court in two Terms. The Court should resolve this persistent conflict.

No. 92–6592. LAAMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 973 F. 2d 107.

No. 92–6856. HARRIS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 839 S. W. 2d 54.

No. 92–6989. ERVIN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 835 S. W. 2d 905.

No. 92–6910. FREY *v.* FULCOMER, WARDEN. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE SOUTER would grant certiorari. Reported below: 974 F. 2d 348.

Rehearing Denied

No. 91–1817. HURLEY ET AL. *v.* UNITED STATES, 506 U. S. 817;
No. 91–8654. PARROTT *v.* UNITED STATES ET AL., 506 U. S. 854;
No. 92–299. GOTZL *v.* CANTRELL (GOTZL), 506 U. S. 917;
No. 92–624. PHELPS *v.* RISON, WARDEN, ET AL., 506 U. S. 976;
No. 92–674. LUM *v.* CITY AND COUNTY OF HONOLULU, 506 U. S. 1022;
No. 92–867. IN RE POLYAK, 506 U. S. 1047;
No. 92–5363. JONES *v.* UNTHANK ET AL., 506 U. S. 893;
No. 92–5529. SYROVATKA *v.* CALIFORNIA, 506 U. S. 1002;
No. 92–5562. MILLER *v.* MCRAE ET AL., 506 U. S. 958;
No. 92–5833. CARLISLE *v.* GRADICK ET AL., 506 U. S. 961;
No. 92–5879. BROWN *v.* BORGERT, WARDEN, 506 U. S. 977;
No. 92–5958. SINDRAM *v.* SAXTON ET AL., 506 U. S. 988;
No. 92–5962. JOHNSON *v.* SPELLING-GOLDBERG PRODUCTIONS, 506 U. S. 978;

No. 92-6011. VENTERS *v.* BASHELOR ET AL., 506 U. S. 1004;

No. 92-6017. ATTWELL *v.* CLARK ET AL., 506 U. S. 1004;

No. 92-6020. SMITH *v.* ALAMEDA COUNTY SHERIFF DEPARTMENT ET AL., 506 U. S. 988;

No. 92-6022. WRIGHT *v.* ILLINOIS, 506 U. S. 1004;

No. 92-6023. SMITH *v.* CITIZENS BANK OF MARYLAND, 506 U. S. 1004;

No. 92-6041. RANKEL *v.* TRACY ET AL., 506 U. S. 978;

No. 92-6076. GYORE *v.* O'CONNELL ET AL., 506 U. S. 1005;

No. 92-6099. SINDRAM *v.* LORENZO ET AL., 506 U. S. 1006;

No. 92-6121. LEWIS *v.* RUSSE ET AL., 506 U. S. 1006;

No. 92-6125. KENEALY *v.* FRUEHAUF CORP. ET AL., 506 U. S. 1006;

No. 92-6126. HOWELL *v.* DELAWARE, 506 U. S. 1006;

No. 92-6139. PACKER *v.* GARRETT, SECRETARY OF THE NAVY, ET AL., 506 U. S. 1036;

No. 92-6155. STOUT *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, 506 U. S. 1024;

No. 92-6161. HENDERSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 506 U. S. 1007;

No. 92-6165. WILLIAMSON *v.* UNITED STATES, 506 U. S. 1007;

No. 92-6216. LUSTGARDEN *v.* GUNTER, EXECUTIVE DIRECTOR, DEPARTMENT OF CORRECTIONS, ET AL., 506 U. S. 1008;

No. 92-6218. ATANASOFF *v.* ARIZONA, 506 U. S. 1008;

No. 92-6234. KENH QUANG PHAM *v.* SECRETARY OF HEALTH AND HUMAN SERVICES, 506 U. S. 1024;

No. 92-6242. BETKA *v.* OREGON ET AL., 506 U. S. 1024;

No. 92-6244. ANDERSON *v.* DEPARTMENT OF THE AIR FORCE, 506 U. S. 1057;

No. 92-6300. EVANS *v.* UNITED STATES, 506 U. S. 991;

No. 92-6317. MULVILLE *v.* NORWEST BANK DES MOINES, NA, ET AL., 506 U. S. 1025;

No. 92-6328. MOSEANKO *v.* FRIEDT ET AL., 506 U. S. 1025;

No. 92-6336. BROWN *v.* UNITED STATES, 506 U. S. 1058;

No. 92-6420. MITAN *v.* UNITED STATES, 506 U. S. 1059;

No. 92-6505. MARTIN *v.* JONES, WARDEN, ET AL., 506 U. S. 1061;

No. 92-6542. RODRIGUEZ *v.* BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL., 506 U. S. 1062;

No. 92-6545. ARNETTE *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES, 506 U. S. 1063;

No. 92–6557. ESTES *v.* MCCOTTER ET AL., 506 U. S. 1063;

No. 92–6608. LANE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 506 U. S. 1065;

No. 92–6686. JOHNSTON *v.* UNITED STATES, 506 U. S. 1068; and

No. 92–6696. TAYLOR *v.* CITY OF NEW ALBANY ET AL., 506 U. S. 1085. Petitions for rehearing denied.

No. 92–732. GULF STATES STEEL, INC. OF ALABAMA *v.* LTV CORP. ET AL., 506 U. S. 1022. Motion of Alabama to intervene or in the alternative to file a brief *amicus curiae* denied. Petition for rehearing denied.

No. 92–5505. DEAN *v.* SMITH ET AL., 506 U. S. 1002. Motion for leave to file petition for rehearing denied.

FEBRUARY 24, 1993

Certiorari Denied

No. 92–7621 (A–622). KELLOGG, AS NEXT FRIEND TO LONCHAR *v.* ZANT, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 978 F. 2d 637.

MARCH 1, 1993

Affirmed on Appeal

No. 92–1194. HOLLOWAY ET AL. *v.* HECHLER, SECRETARY OF STATE OF WEST VIRGINIA, ET AL. Affirmed on appeal from D. C. S. D. W. Va. Reported below: 817 F. Supp. 617.

Certiorari Granted—Vacated and Remanded

No. 92–856. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTE AT WALPOLE, ET AL. *v.* DOMEGAN. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Farrar* v. *Hobby*, 506 U. S. 103 (1992). Reported below: 972 F. 2d 401.

No. 92–982. MOHWISH *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Acting Solicitor General in his brief for the United States filed February 5, 1993. Reported below: 965 F. 2d 1390.

Miscellaneous Orders

No. ———. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. ———. GRADILLAS *v.* CITY OF RANCHO MIRAGE; and
No. ———. SCHWARTZ *v.* NORDSTROM, INC., ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. ———. FALTAS *v.* MCCANTS. Motion to direct the Clerk to file statement as to jurisdiction denied.

No. D–1217. IN RE DISBARMENT OF GLECIER. Daniel P. Glecier, of Lompoc, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on December 14, 1992 [506 U. S. 1031], is hereby discharged.

No. D–1218. IN RE DISBARMENT OF HAMMEL. Disbarment entered. [For earlier order herein, see 506 U. S. 1031.]

No. D–1220. IN RE DISBARMENT OF SUGARMAN. Disbarment entered. [For earlier order herein, see 506 U. S. 1045.]

No. D–1223. IN RE DISBARMENT OF THEOHAROUS. Disbarment entered. [For earlier order herein, see 506 U. S. 1045.]

No. D–1238. IN RE DISBARMENT OF SMALL. It is ordered that David Bruce Small, of Carson City, Nev., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1239. IN RE DISBARMENT OF MATAR. It is ordered that Michael Levi Matar, of Forest Hills, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1240. In re Disbarment of Postel. It is ordered that Ira Postel, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1241. In re Disbarment of Oshatz. It is ordered that Michael P. Oshatz, of Scarsdale, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1242. In re Disbarment of Fleisher. It is ordered that Jerrold M. Fleisher, of Closter, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1243. In re Disbarment of Dambach. It is ordered that Joseph A. Dambach, of Fords, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1244. In re Disbarment of Gordon. It is ordered that Francis Guthrie Gordon III, of Charlottesville, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92–114. Cardinal Chemical Co. et al. *v.* Morton International, Inc. C. A. Fed. Cir. [Certiorari granted, 506 U. S. 813.] Motion of the parties for divided argument to permit American Bar Association and American Intellectual Property Law Association to participate in oral argument as *amici curiae* denied.

No. 92–6609. Boyer *v.* DeClue et al. C. A. 8th Cir. Motion of petitioner to strike certain portions of respondent's brief in opposition and for sanctions denied.

No. 92–6739. In re Anderson. Petition for writ of habeas corpus denied.

No. 92–6818. In re Slayback;

No. 92–6820. In re Cofield; and

No. 92–6876. In re Green. Petitions for writs of mandamus denied.

No. 92–6889. In re Morris. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 92–833. Albright *v.* Oliver et al. C. A. 7th Cir. Certiorari granted. Reported below: 975 F. 2d 343.

No. 92–1168. Harris *v.* Forklift Systems, Inc. C. A. 6th Cir. Certiorari granted. Reported below: 976 F. 2d 733.

No. 91–2012. Holder, Individually and in His Official Capacity as County Commissioner for Bleckley County, Georgia, et al. *v.* Hall et al. C. A. 11th Cir. Certiorari granted limited to the following question: "Whether the Court of Appeals erred in holding that governance by a single county commissioner, rather than a multimember board of commissioners, is subject to challenge as dilutive under § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973?" Reported below: 955 F. 2d 1563.

Certiorari Denied

No. 92–828. Cruce *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 21.

No. 92–888. Bucuvalas et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 970 F. 2d 937.

No. 92–889. Chauffeurs, Teamsters & Helpers, Local 776, Affiliated With International Brotherhood of Teamsters, AFL–CIO *v.* National Labor Relations Board et al. C. A. 3d Cir. Certiorari denied. Reported below: 973 F. 2d 230.

No. 92–901. Louwsma *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 970 F. 2d 797.

No. 92–961. Lipshutz *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1333.

No. 92–963. MIX *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 35 M. J. 283.

No. 92–965. GELB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 705.

No. 92–978. BELLAMY *v.* COGDELL, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 974 F. 2d 302.

No. 92–984. DAILY GAZETTE CO., INC. *v.* HINERMAN. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 188 W. Va. 157, 423 S. E. 2d 560.

No. 92–985. GOLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 1449.

No. 92–994. WHITEHOUSE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 972 F. 2d 1328.

No. 92–1147. OKOCHA *v.* CASE WESTERN RESERVE UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1215.

No. 92–1159. FAULKNER-KING *v.* WICKS ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 226 Ill. App. 3d 962, 590 N. E. 2d 511.

No. 92–1164. GORDON *v.* CITY OF TULSA, OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–1165. SANDERS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 596 N. E. 2d 225.

No. 92–1166. CARTER *v.* BALTIMORE CITY POLICE DEPARTMENT ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 92 Md. App. 737.

No. 92–1173. NATIONAL ADVERTISING CO. ET AL. *v.* CITY OF ROLLING MEADOWS, ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 228 Ill. App. 3d 737, 593 N. E. 2d 551.

No. 92–1178. GAINES, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINOR CHILD, GAINES *v.* CITY OF BATON ROUGE, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92–1181. BYRUM ET AL. *v.* BEAR INVESTMENT CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 338.

No. 92–1182. EWALD *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 339.

No. 92–1184. ARENELLA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 415 Pa. Super. 652, 601 A. 2d 367.

No. 92–1187. ALBERT *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 17.

No. 92–1191. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* USX CORP. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1394.

No. 92–1192. WALKER *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 974 F. 2d 293.

No. 92–1195. MORRIS *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 833 S. W. 2d 624.

No. 92–1218. GARRETT *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 339.

No. 92–1240. PARILLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–1242. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 578.

No. 92–1264. SOTIR ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 978 F. 2d 29.

No. 92–1285. TINSLEY ET AL. *v.* AMERICAN PRESIDENT LINES, LTD. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 6 Cal. App. 4th 562, 8 Cal. Rptr. 2d 851.

No. 92–1291. FROHLICH *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 92–6002. DUGAN *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 92–6449. DAVIS *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 13.

No. 92–6469. MCGLORY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 968 F. 2d 309.

No. 92–6518. WILSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 609 So. 2d 463.

No. 92–6551. ISLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 343.

No. 92–6714. HINOJOSA *v.* MCCAUGHTRY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 92–6767. CLARK *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 353.

No. 92–6805. DILLARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 1554.

No. 92–6811. GREER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 433.

No. 92–6826. WILLIAMS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 92–6855. RUDDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 675.

No. 92–7008. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 925.

No. 92–7128. DANIELS *v.* HARGETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92–7130. SIMMONS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 609 So. 2d 36.

No. 92–7131. STANLEY *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 973 F. 2d 680.

No. 92–7134. Smith *v.* Haith et al. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1261.

No. 92–7135. Wagner *v.* Williford et al. C. A. 7th Cir. Certiorari denied.

No. 92–7142. Holbrook *v.* Kentucky. Sup. Ct. Ky. Certiorari denied.

No. 92–7143. Hugues *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 230 Ill. App. 3d 192, 595 N. E. 2d 1.

No. 92–7149. Embaby *v.* Control Data Corp. Sup. Ct. Minn. Certiorari denied.

No. 92–7153. Bryant *v.* Roth, Warden. C. A. 7th Cir. Certiorari denied.

No. 92–7154. Testa *v.* Testa. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 583.

No. 92–7159. Newman *v.* McKay et al. C. A. 7th Cir. Certiorari denied.

No. 92–7168. Nadworny *v.* Fair, Massachusetts Commissioner of Corrections. C. A. 1st Cir. Certiorari denied. Reported below: 976 F. 2d 724.

No. 92–7170. Poly *v.* Singletary, Secretary, Florida Department of Corrections, et al. Sup. Ct. Fla. Certiorari denied. Reported below: 613 So. 2d 7.

No. 92–7171. Lavernia *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 92–7172. Madyun *v.* Barksdale et al. C. A. 6th Cir. Certiorari denied.

No. 92–7178. Bishop *v.* Swinney et al. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 1265.

No. 92–7187. McConnell *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–7188. LAZOR *v.* YLST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 587.

No. 92–7195. POWELL *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 980 F. 2d 733.

No. 92–7199. COTNER *v.* CREEK COUNTY, OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied.

No. 92–7200. BALFOUR *v.* MISSISSIPPI. Cir. Ct. Desoto County, Miss. Certiorari denied.

No. 92–7221. PRINCE *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 118.

No. 92–7229. ECHOLS *v.* YUKON TELEPHONE CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1338.

No. 92–7238. DENARDO *v.* MUNICIPALITY OF ANCHORAGE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1341.

No. 92–7254. PHELPS *v.* EFFERSON. Ct. Sp. App. Md. Certiorari denied. Reported below: 92 Md. App. 753.

No. 92–7255. SLOAN *v.* CITY OF LYNCHBURG ET AL. C. A. 4th Cir. Certiorari before judgment denied.

No. 92–7264. WALKER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 958 F. 2d 1079.

No. 92–7272. ROBNETT *v.* BLODGETT, SUPERINTENDENT, OREGON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 590.

No. 92–7276. WOODS *v.* ZENON, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 594.

No. 92–7318. HOLT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 92-7343. WAYNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 594.

No. 92-7353. CANAS-PENA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 743.

No. 92-7356. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92-7357. RODRIGUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 1249.

No. 92-7359. LAUDERDALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 711.

No. 92-7364. LUCAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 846.

No. 92-7370. BEDELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1262 and 981 F. 2d 915.

No. 92-7371. BERTRAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92-7372. BRODENE *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 493 N. W. 2d 793.

No. 92-7374. COBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 975 F. 2d 152.

No. 92-7382. FUENTES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1268.

No. 92-7384. HARDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92-7386. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92-7387. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92-7388. JESSUP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 966 F. 2d 1354.

No. 92-7391. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–7398. GALLIANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 1350.

No. 92–7404. EDWARDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–7408. MIGOYO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 23.

No. 92–7409. MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 1330.

No. 92–7411. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92–7413. NENGHABI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 867.

No. 92–7420. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–7423. SUMMERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 717.

No. 92–7424. BYNUM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 929 F. 2d 694.

No. 92–7426. BONILLA-SAENZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 711.

No. 92–7427. COWART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 174.

No. 92–7441. CASHMAN *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 491 N. W. 2d 462.

No. 92–7447. LEONARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 981 F. 2d 1123.

No. 92–7493. MARENO *v.* JET AVIATION OF AMERICA, INC. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1126.

No. 92–893. HARTFORD LIFE & ACCIDENT INSURANCE CO. ET AL. *v.* FUGARINO ET AL. C. A. 6th Cir. Motion of American Council of Life Insurance et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 969 F. 2d 178.

No. 92–895. Rouch *v.* Enquirer & News of Battle Creek, Michigan. Sup. Ct. Mich. Certiorari denied. Justice White and Justice Thomas would grant certiorari. Reported below: 440 Mich. 238, 487 N. W. 2d 205.

No. 92–1013. Chapman *v.* Powermatic, Inc. C. A. 5th Cir. Certiorari denied. Justice White and Justice Blackmun would grant certiorari. Reported below: 969 F. 2d 160.

No. 92–6423. Gayle *v.* United States; and
No. 92–6647. Hester *v.* United States. C. A. 11th Cir. Certiorari denied. Justice White would grant certiorari. Reported below: 967 F. 2d 483 and 488.

No. 92–6584. Allen *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Justice Blackmun, Justice O'Connor, and Justice Souter would grant certiorari and reverse the judgment. Reported below: 331 N. C. 746, 417 S. E. 2d 227.

No. 92–7123. Vitale *v.* Vitale. Sup. Ct. N. H. Motion of respondent for award of damages denied. Certiorari denied.

No. 92–7251. Assa'ad-Faltas *v.* Virginia Department of Health et al. C. A. 4th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 972 F. 2d 339.

Rehearing Denied

No. 92–860. Avila *v.* United States, 506 U. S. 1054;
No. 92–5476. Hudson *v.* North Carolina, 506 U. S. 1055;
No. 92–6360. Blue *v.* Illinois, 506 U. S. 1058;
No. 92–6387. Wigley *v.* Alfred Hughes Unit et al., 506 U. S. 1058;
No. 92–6421. Padios *v.* Continental Group, Inc., et al., 506 U. S. 1059;
No. 92–6460. Valdiviez *v.* United States, 506 U. S. 1060;
No. 92–6477. Cooper *v.* Groose, Superintendent, Jefferson City Correctional Center (two cases), 506 U. S. 1060;
No. 92–6524. Camarena *v.* Superior Court of Long Beach, 506 U. S. 1062;
No. 92–6548. Ketchum *v.* Griffith et al., 506 U. S. 1063;
No. 92–6567. Jones et al. *v.* Lassen et al., 506 U. S. 1064;
No. 92–6614. Brager *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division, 506 U. S. 1065;

No. 92–6626. DEEMER *v.* CAIN, WARDEN, ET AL., 506 U. S. 1066;

No. 92–6677. WIGLEY *v.* ALFRED HUGHES UNIT ET AL., 506 U. S. 1084; and

No. 92–6734. WIGLEY *v.* SMITH ET AL., 506 U. S. 1085. Petitions for rehearing denied.

No. 91–7580. GRAHAM *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 506 U. S. 461. Motion of respondent to strike petition for rehearing denied. Petition for rehearing denied.

MARCH 3, 1993

Miscellaneous Order

No. A–654. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BREWER, AS NEXT FRIEND OF BREWER. Application to vacate the stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that the order staying the execution entered by Judge Norris of the United States Court of Appeals for the Ninth Circuit on March 2, 1993, is vacated. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the application.

MARCH 4, 1993

Certiorari Denied

No. 92–7815 (A–652). SAWYER *v.* WHITLEY, WARDEN. 24th Jud. Dist. Ct. La., Jefferson Parish. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER would grant the application for stay.

MARCH 8, 1993

Dismissals Under Rule 46

No. 92–358. KENTUCKY CABINET FOR HUMAN RESOURCES ET AL. *v.* MADRY. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 961 F. 2d 1576.

No. 92–812. PETROL MARINE CORP. *v.* PARFAIT. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 974 F. 2d 171.

Certiorari Granted—Vacated and Remanded

No. 92–96. Mertens *v.* Wilkinson, Governor of Kentucky, et al. Sup. Ct. Ky. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit, ante,* p. 163.

No. 92–973. Harris County Appraisal District et al. *v.* Transamerica Container Leasing, Inc. Ct. App. Tex., 1st Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Itel Containers Int'l Corp.* v. *Huddleston, ante,* p. 60. Justice Stevens would deny certiorari. Reported below: 821 S. W. 2d 637.

No. 92–5060. Sullivan *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Dunnigan, ante,* p. 87. Reported below: 945 F. 2d 413.

No. 92–6558. Hudson *v.* United States. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic Nat. Bank of Miami* v. *United States,* 506 U. S. 80 (1992).

Certiorari Granted—Reversed. (See No. 92–409, *ante,* p. 272.)

Miscellaneous Orders. (See also No. 92–6846, *ante,* p. 290.)

No. A–621. Ibarra, Executive Director, Colorado Department of Social Services, et al. *v.* Duc Van Le. Application for stay, presented to Justice White, and by him referred to the Court, granted, and it is ordered that the judgment of the Supreme Court of Colorado in case No. 91SC189 is stayed pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

No. D–1193. In re Disbarment of McGowan. Disbarment entered. [For earlier order herein, see 506 U. S. 949.]

No. D–1199. In re Disbarment of Kirk. Disbarment entered. [For earlier order herein, see 506 U. S. 950.]

No. D–1214. In re Disbarment of Bodell. Disbarment entered. [For earlier order herein, see 506 U. S. 995.]

No. D–1245. In re Disbarment of Cohen. It is ordered that Harold Murray Cohen, of Secaucus, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 119, Orig. Connecticut et al. *v.* New Hampshire. Motion of the Special Master for award of fees and disbursements granted, and the Special Master is awarded a total of $129,031 to be paid as follows: Connecticut, Massachusetts, and Rhode Island to each pay $14,336.78 and New Hampshire and the intervening utilities to each pay $43,010.33. Justice Souter took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 506 U. S. 1090.]

No. 92–311. Shalala, Secretary of Health and Human Services *v.* Schaefer. C. A. 8th Cir. [Certiorari granted *sub nom. Sullivan* v. *Schaefer*, 506 U. S. 997.] Motion of the Acting Solicitor General to permit William K. Kelley, Esq., to present oral argument *pro hac vice* granted.

No. 92–351. Heller, Secretary, Kentucky Cabinet for Human Resources *v.* Doe, by His Mother and Next Friend, Doe, et al. C. A. 6th Cir. [Certiorari granted, 506 U. S. 939.] Motion of petitioner for leave to file a reply brief out of time granted.

No. 92–1012. Simpson Paper (Vermont) Co. *v.* Department of Environmental Conservation et al. Sup. Ct. Vt. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–7241. Demos *v.* Washington. C. A. 9th Cir.; and

No. 92–7242. Demos *v.* United States Court of Appeals for the Ninth Circuit. C. A. 9th Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until March 29, 1993, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petitions for writs of certiorari.

No. 92–1339. IN RE REINBOLD. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 92–896. THUNDER BASIN COAL CO. *v.* REICH, SECRETARY OF LABOR, ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 969 F. 2d 970.

No. 92–903. POSTERS 'N' THINGS, LTD., ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. Reported below: 969 F. 2d 652.

Certiorari Denied

No. 91–6694. WILLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 940 F. 2d 1136.

No. 91–7853. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 952 F. 2d 394.

No. 91–8100. SEABOLT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 958 F. 2d 231.

No. 91–8203. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 954 F. 2d 730.

No. 92–410. BECKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 383.

No. 92–496. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 966 F. 2d 676.

No. 92–840. COMMONWEALTH LAND TITLE INSURANCE CO. *v.* BRADLEY. C. A. 5th Cir. Certiorari denied. Reported below: 960 F. 2d 502.

No. 92–872. GHASSAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 631.

No. 92–935. WARD *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MADISON GUARANTY SAVINGS & LOAN ASSN., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 196.

No. 92–940. ALM CORP. *v.* ENVIRONMENTAL PROTECTION AGENCY, REGION II. C. A. 3d Cir. Certiorari denied. Reported below: 974 F. 2d 380.

No. 92–956. CITY OF NEW YORK *v.* WALKER. C. A. 2d Cir. Certiorari denied. Reported below: 974 F. 2d 293.

No. 92–988. LEISHMAN-DONALDSON ET AL. *v.* BALAS. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 733.

No. 92–1019. SIERRA TELCOM SERVICES, INC. *v.* HARTNETT, COMMISSIONER OF LABOR OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 174 App. Div. 2d 279, 579 N. Y. S. 2d 753.

No. 92–1033. TEMPLETON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 352.

No. 92–1042. NATIONAL COMMODITY & BARTER ASSN. ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 356.

No. 92–1047. LAMON ET AL. *v.* CITY OF SHAWNEE, KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 1145.

No. 92–1051. TEXAS *v.* MARTINEZ. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 824 S. W. 2d 724.

No. 92–1066. EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* SOJOURNER T. ET AL.; and

No. 92–1157. CONNICK *v.* SOJOURNER T. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 27.

No. 92–1067. CONNECTICUT *v.* APARO; and

No. 92–1308. APARO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 223 Conn. 384, 614 A. 2d 401.

No. 92–1088. CATAWBA INDIAN TRIBE OF SOUTH CAROLINA *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1334.

No. 92–1158. PHELAN ET AL. *v.* LOCAL 305 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE UNITED

STATES AND CANADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 973 F. 2d 1050.

No. 92–1199. ASHLEY *v.* EPIC DIVERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 730.

No. 92–1202. KNOP ET AL. *v.* MCGINNIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 996.

No. 92–1205. AUNYX CORP. ET AL. *v.* CANON U. S. A., INC. C. A. 1st Cir. Certiorari denied. Reported below: 978 F. 2d 3.

No. 92–1206. STUART *v.* WINTER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92–1208. BEIZER *v.* GEOPFERT ET AL. App. Ct. Conn. Certiorari denied. Reported below: 28 Conn. App. 693, 613 A. 2d 1336.

No. 92–1210. BRESSLER *v.* FORTUNE MAGAZINE, A DIVISION OF TIME, INC. C. A. 6th Cir. Certiorari denied. Reported below: 971 F. 2d 1226.

No. 92–1215. JACKSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 149 Ill. 2d 540, 599 N. E. 2d 926.

No. 92–1216. HESS *v.* PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 723.

No. 92–1217. COOL LIGHT CO., INC. *v.* GTE PRODUCTS CORP. C. A. 1st Cir. Certiorari denied. Reported below: 973 F. 2d 31.

No. 92–1220. VAN HOUTEN *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 92–1233. COLLINS PINE CO. ET AL. *v.* ROLICK. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1009.

No. 92–1236. UNIT RIG, INC., ET AL. *v.* WHALEN. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1248.

No. 92–1248. DI GIAMBATTISTA *v.* MCGOVERN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 974 F. 2d 1329.

No. 92–1250. CONCERNED CITIZENS FOR NELLIE'S CAVE COMMUNITY, INC. *v.* JABLONSKI ET AL. C. A. 4th Cir. Certiorari denied.

No. 92–1251. Zimmerman *v.* Northwestern Mutual Life Insurance Company of Milwaukee et al. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1348.

No. 92–1325. Zawrotny, Personal Representative of the Estate of Ballard, Deceased *v.* Brewer. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1204.

No. 92–5339. Woodards *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 1308.

No. 92–5421. Thompson *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 295 U. S. App. D. C. 277, 962 F. 2d 1069.

No. 92–5534. Hall et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 968 F. 2d 1216.

No. 92–6624. Nichols *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1336.

No. 92–6653. Freeman *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 92–6664. Thakkar *v.* Debevoise. C. A. 3d Cir. Certiorari denied.

No. 92–6679. Tate *v.* Mantle et al. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 835 S. W. 2d 409.

No. 92–6703. Rogers *v.* Oregon. Sup. Ct. Ore. Certiorari denied. Reported below: 313 Ore. 356, 836 P. 2d 1308.

No. 92–6796. Zook *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 532 Pa. 79, 615 A. 2d 1.

No. 92–6809. Prows *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1334.

No. 92–6864. Patino-Rojas *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 974 F. 2d 94.

No. 92–6878. Burton *v.* City of Youngstown et al. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 580.

No. 92–6911. Galloway *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 976 F. 2d 414.

No. 92-6917. CONRADE *v.* UNITED STATES; and
No. 92-7217. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 960 F. 2d 1569.

No. 92-6934. ARNTZ ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 92-6936. LIVADITIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 759, 831 P. 2d 297.

No. 92-6941. DONALD *v.* UNITED STATES DEPARTMENT OF EDUCATION. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1048.

No. 92-6973. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1348.

No. 92-6982. SAMUEL *v.* ESTELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 961 F. 2d 217.

No. 92-7009. SHERROD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 964 F. 2d 1501.

No. 92-7039. NARVAIZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 840 S. W. 2d 415.

No. 92-7042. WHITE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92-7080. LOPEZ GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 946 F. 2d 1542.

No. 92-7089. MCCULLOUGH *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 967 F. 2d 530.

No. 92-7127. RAPER *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92-7209. ADKINS *v.* OHIO. Ct. App. Ohio, Athens County. Certiorari denied. Reported below: 80 Ohio App. 3d 211, 608 N. E. 2d 1152.

No. 92-7210. DAVIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 742.

No. 92–7212. WARE *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 586.

No. 92–7222. ZURITA *v.* MCGUFFIN ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–7223. WHITE *v.* WHITLEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 594.

No. 92–7224. TATES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–7228. NORTHINGTON *v.* VERDUN. Ct. App. Mich. Certiorari denied.

No. 92–7230. JACKSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 597 N. E. 2d 950.

No. 92–7234. FERDIK *v.* CORBETT ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–7236. JONES *v.* HERBERT, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 845.

No. 92–7240. DANSBY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 609 So. 2d 455.

No. 92–7243. JOHNSON *v.* BORG, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 92–7244. GAGER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–7250. GAGER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–7252. MORRISON *v.* PENNSYLVANIA STATE BOARD OF MEDICINE ET AL. Sup. Ct. Pa. Certiorari denied.

No. 92–7258. MCNEAR *v.* DENNY'S INC. C. A. 8th Cir. Certiorari denied.

No. 92–7260. MARTIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 602 So. 2d 1263.

No. 92-7263. OTERO *v.* STATE ELECTION BOARD OF OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 975 F. 2d 738.

No. 92-7266. RECORD *v.* GOLDSMITH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 590.

No. 92-7268. HARMON *v.* OCEANCOLOUR SHIPPING, LTD. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92-7281. YOHEY *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 122.

No. 92-7312. ALVAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1000.

No. 92-7313. DANSBY *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 588.

No. 92-7314. SHERLEY *v.* SEABOLD, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 980 F. 2d 731.

No. 92-7321. JOHNSON *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 976 F. 2d 747.

No. 92-7340. SCHNEIDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1533.

No. 92-7355. MURIETTA-ACOSTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92-7358. MCCLAIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92-7363. MCPHEARSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 593.

No. 92-7366. MOSS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 172 Wis. 2d 110, 492 N. W. 2d 627.

No. 92-7367. NELSON *v.* FORMAN. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 92-7369. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92–7375. SOLOMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 711.

No. 92–7379. GARCIA-GIRALDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92–7383. HARDESTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 1347.

No. 92–7389. GENTRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1262.

No. 92–7395. KAMMERUD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1262.

No. 92–7397. HICKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 92–7402. KOWEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1445.

No. 92–7403. FRAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–7415. MCGANN *v.* BIDERMAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–7418. YOUNG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 975 F. 2d 1537.

No. 92–7430. SPINA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 735.

No. 92–7436. CALDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 687.

No. 92–7437. BAILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 578.

No. 92–7439. KAYLOR *v.* BRADLEY, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 581.

No. 92–7445. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 352.

No. 92-7449. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92-7452. NINO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 967 F. 2d 1508.

No. 92-7453. PADGETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92-7455. RICKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 721.

No. 92-7458. WALKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92-7459. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 574.

No. 92-7468. STEWART *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 81.

No. 92-7469. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92-7472. BODELL *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 838 S. W. 2d 395.

No. 92-7482. BOYD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1256.

No. 92-7484. GALLOWAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 213.

No. 92-7487. GONZALEZ-QUINTANILLA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 208.

No. 92-7488. DAVIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 396, 974 F. 2d 182.

No. 92-7491. LEDEAUX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 208.

No. 92-7497. SOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 717.

No. 92-7498. THARPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 851.

No. 92–7505. Kimberlin *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1261.

No. 92–7508. Rowles *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–7514. Alexander *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–7519. Yannessa *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 570.

No. 92–7576. Johnson *v.* Injured Workers Insurance Fund. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1255.

Rehearing Denied

No. 92–706. Yamaha Corporation of America *v.* United States et al., 506 U. S. 1078;
No. 92–864. Alexander *v.* Rice, Secretary of the Air Force, 506 U. S. 1054;
No. 92–898. Jatoi et ux. *v.* Aetna Insurance Co. et al., 506 U. S. 1081;
No. 92–908. Caplinger et al. *v.* Doe, 506 U. S. 1087;
No. 92–6187. Kleinschmidt *v.* United States Fidelity & Guaranty Insurance Co. et al., 506 U. S. 1083;
No. 92–6238. Mathis *v.* Florida, 506 U. S. 1008;
No. 92–6287. Hirschfeld *v.* United States, 506 U. S. 1087;
No. 92–6305. Barnard *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division, 506 U. S. 1057;
No. 92–6662. Sudarsky *v.* City of New York et al., 506 U. S. 1084;
No. 92–6707. Brokenbrough *v.* Redman, Warden, et al., 506 U. S. 1085; and
No. 92–6708. Ward *v.* Georgia, 506 U. S. 1085. Petitions for rehearing denied.

March 9, 1993

Dismissal Under Rule 46

No. 92–375. Arizona State Senate *v.* Arizonans for Fair Representation et al. Appeal from D. C. Ariz. dismissed under this Court's Rule 46. Reported below: 828 F. Supp. 684.

MARCH 18, 1993

Miscellaneous Order

No. A–698 (92–7944). POYNER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution.

MARCH 19, 1993

Certiorari Denied

No. 92–1480 (A–691). SANTANA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 979 F. 2d 1534.

MARCH 22, 1993

Affirmed on Appeal

No. 92–362. HISPANIC CHAMBER OF COMMERCE ET AL. *v.* ARIZONANS FOR FAIR REPRESENTATION ET AL. Affirmed on appeal from D. C. Ariz. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 828 F. Supp. 684.

Appeals Dismissed

No. 92–1257. WATKINS ET AL. *v.* FORDICE, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 92–1295. FORDICE, GOVERNOR OF MISSISSIPPI, ET AL. *v.* WATKINS ET AL. Appeals from D. C. S. D. Miss. dismissed for want of jurisdiction. Reported below: 807 F. Supp. 406.

Certiorari Granted—Vacated and Remanded

No. 92–933. LOPES, TRUSTEE *v.* CITY OF PEABODY, MASSACHUSETTS. App. Ct. Mass. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003 (1992). Reported below: 32 Mass. App. 1124, 595 N. E. 2d 812.

Miscellaneous Orders

No. — — —. HOPKINS, WARDEN *v.* RUST. Motion of petitioner to dispense with printing portions of the appendix to the petition for writ of certiorari denied.

No. A–598. WEINER ET AL. *v.* NATIONAL CITY ET AL. Sup. Ct. Cal. Application for stay pending filing and disposition of a petition for writ of certiorari, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. D–1221. IN RE DISBARMENT OF TOY. Disbarment entered. [For earlier order herein, see 506 U. S. 1045.]

No. D–1225. IN RE DISBARMENT OF GLADSON. Disbarment entered. [For earlier order herein, see 506 U. S. 1076.]

No. D–1226. IN RE DISBARMENT OF WADDELL. Disbarment entered. [For earlier order herein, see 506 U. S. 1076.]

No. D–1227. IN RE DISBARMENT OF ANSHEN. Disbarment entered. [For earlier order herein, see 506 U. S. 1076.]

No. D–1246. IN RE DISBARMENT OF SIMRING. It is ordered that Ellis S. Simring, of Hollywood, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1247. IN RE DISBARMENT OF KEEL. It is ordered that Alvin Lamar Keel, of Bingham Farms, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1248. IN RE DISBARMENT OF HAYES. It is ordered that Janice Marie Hayes, of Las Vegas, Nev., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1249. IN RE DISBARMENT OF SCHINDELAR. It is ordered that Kathryn Ann Schindelar, of Stanhope, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–1250. In re Disbarment of Williams. It is ordered that Patrick D. Williams, of Boulder, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92–1274. Anago Inc. *v.* Tecnol Medical Products, Inc. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–7703. In re Haas; and
No. 92–7721. In re Kipps. Petitions for writs of habeas corpus denied.

No. 92–1070. In re Tweedy;
No. 92–7456. In re Markham;
No. 92–7461. In re Mason; and
No. 92–7466. In re Mason. Petitions for writs of mandamus denied.

No. 92–7201. In re Vereen. Petition for writ of prohibition denied.

Certiorari Granted

No. 92–741. Federal Deposit Insurance Corporation *v.* Meyer. C. A. 9th Cir. Certiorari granted. Reported below: 944 F. 2d 562.

No. 92–1074. John Hancock Mutual Life Insurance Co. *v.* Harris Trust & Savings Bank, as Trustee of the Sperry Master Retirement Trust No. 2. C. A. 2d Cir. Certiorari granted. Reported below: 970 F. 2d 1138.

No. 92–1180. United States *v.* James Daniel Good Real Property et al. C. A. 9th Cir. Certiorari granted. Reported below: 971 F. 2d 1376.

Certiorari Denied

No. 91–1984. South Carolina Property & Casualty Insurance Guaranty Assn. *v.* Olivier. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 827.

No. 91–8736. Sneed *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 3, 584 N. E. 2d 1160.

No. 92–444. FATO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 92–709. ASSOCIATED BUILDERS & CONTRACTORS, INC., ET AL. *v.* CITY OF SEWARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 966 F. 2d 492.

No. 92–724. PHOENIX ENGINEERING, INC., ET AL. *v.* MK-FERGUSON OF OAK RIDGE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1513.

No. 92–763. LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT ET AL. *v.* HUTCHINSON. Ct. App. Ky. Certiorari denied.

No. 92–859. STEINMETZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 973 F. 2d 212.

No. 92–928. MEYER *v.* PATTULLO. C. A. 9th Cir. Certiorari denied. Reported below: 944 F. 2d 562.

No. 92–967. BILLOTTI *v.* LEGURSKY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 975 F. 2d 113.

No. 92–1015. SANSON *v.* GENERAL MOTORS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 618.

No. 92–1021. DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA *v.* BAYLSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 102.

No. 92–1043. CRITICAL MASS ENERGY PROJECT *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 8, 975 F. 2d 871.

No. 92–1061. CHRONICLE PUBLISHING CO. ET AL. *v.* RISON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 962 F. 2d 959.

No. 92–1062. I. T. O. CORPORATION OF BALTIMORE *v.* SELLMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 954 F. 2d 239 and 967 F. 2d 971.

No. 92–1069. ILLES *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 982 F. 2d 163.

No. 92–1081. MALDONADO ESPINOSA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 968 F. 2d 101.

No. 92–1085. MARYLAND & VIRGINIA MILK PRODUCERS COOPERATIVE ASSN., INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1333.

No. 92–1090. COOPER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 35 M. J. 417.

No. 92–1106. FRIKO CORP. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 971 F. 2d 974.

No. 92–1130. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 32.

No. 92–1131. HOLLIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 971 F. 2d 1441.

No. 92–1176. ISGRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1091.

No. 92–1188. STRASS *v.* STRASS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 227 Ill. App. 3d 1112, 646 N. E. 2d 37.

No. 92–1207. MARYLAND *v.* GRANDISON; and
No. 92–7406. GRANDISON *v.* MARYLAND. Cir. Ct. Somerset County, Md. Certiorari denied.

No. 92–1221. HIRT ET AL. *v.* CITY OF STRONGSVILLE, OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 92–1224. NINTENDO OF AMERICA, INC. *v.* LEWIS GALOOB TOYS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 964 F. 2d 965.

No. 92–1225. RANDLEMAN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 310 Ark. 411, 837 S. W. 2d 449.

No. 92–1228. REPUBLIC NATIONAL BANK *v.* AMWEST SURETY INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 122.

No. 92–1230. TRINSEY *v.* HAZELTINE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 867.

No. 92–1231. ALLEN *v.* SOUTH CENTRAL BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 730.

No. 92–1238. NEW MEXICO ET AL. *v.* NAVAJO NATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 975 F. 2d 741.

No. 92–1243. BENECKE, INDIVIDUALLY AND T/A TCB TOWING *v.* BOROUGH OF FORT LEE, NEW JERSEY, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 92–1244. FINE *v.* PETTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1342.

No. 92–1246. JOHNSTON-TAYLOR, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF TAYLOR, ET AL. *v.* GANNON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 1338.

No. 92–1247. VOGEL, ON BEHALF OF THE ESTATE OF GOTTFRIED, DECEASED *v.* ELLIS, ADMINISTRATOR AND ATTORNEY OF THE ESTATE OF GOTTFRIED, DECEASED. Ct. App. Ohio, Wyandot County. Certiorari denied.

No. 92–1252. CRANE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 422 Pa. Super. 628, 613 A. 2d 1259.

No. 92–1253. TORRES ET AL. *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 177 App. Div. 2d 97, 581 N. Y. S. 2d 194.

No. 92–1254. REED *v.* PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD CO. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 724.

No. 92–1255. ARKIN *v.* GAITHERSBURG PUBLISHING CO., INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 92 Md. App. 734.

No. 92–1256. CLARK ET UX. *v.* CLARK. Ct. App. D. C. Certiorari denied.

No. 92–1259. HARRIS TRUST & SAVINGS BANK, AS TRUSTEE OF THE SPERRY MASTER RETIREMENT TRUST NO. 2 *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1138.

No. 92-1260. HYBUD EQUIPMENT CORP. ET AL. *v.* SPHERE DRAKE INSURANCE CO., LTD. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 657, 597 N. E. 2d 1096.

No. 92-1263. CHABERT *v.* SOUTHERN PACIFIC TRANSPORTATION CO. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 441.

No. 92-1267. MADISON ET UX. *v.* MAGNA MACHINE CO. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 568.

No. 92-1268. OCHS, PERSONAL REPRESENTATIVE OF THE ESTATE OF OCHS, DECEASED, ET AL. *v.* EASTER. Sup. Ct. Mo. Certiorari denied. Reported below: 837 S. W. 2d 516.

No. 92-1269. MILLER *v.* PENSION PLAN FOR EMPLOYEES OF COASTAL CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 622.

No. 92-1270. ZARSKY *v.* TEXAS. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 827 S. W. 2d 408.

No. 92-1272. JIT KIM LIM *v.* CENTRAL DUPAGE HOSPITAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 758.

No. 92-1273. SOUTHVIEW ASSOCIATES, LTD., ET AL. *v.* INDIVIDUAL MEMBERS OF THE VERMONT ENVIRONMENTAL BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 980 F. 2d 84.

No. 92-1275. DEUTSCH ET AL. *v.* OLADEINDE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 963 F. 2d 1481.

No. 92-1280. LAWS *v.* WHITE, TRUSTEE OF TOWN BOARD OF ROCKVILLE, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 585.

No. 92-1281. RAMIREZ-LUJAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 930.

No. 92-1282. LUSTER ET AL. *v.* CUSHMAN. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 170.

No. 92-1283. LAHAY *v.* ARMONTROUT, ASSISTANT DIRECTOR, MISSOURI DIVISION OF ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 974 F. 2d 979.

No. 92–1290. RESHARD *v.* COMMITTEE ON ADMISSIONS FOR THE DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied.

No. 92–1300. KENDALL ET AL. *v.* CITY OF VISALIA, CALIFORNIA, ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 92–1302. INTERNATIONAL RAW MATERIALS, LTD. *v.* STAUFFER CHEMICAL CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 978 F. 2d 1318.

No. 92–1313. SACRAMENTO COUNTY BOARD OF SUPERVISORS *v.* SACRAMENTO COUNTY LOCAL AGENCY FORMATION COMMISSION ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 903, 838 P. 2d 1198.

No. 92–1324. DERVISHIAN ET AL. *v.* DERVISHIAN. Sup. Ct. Va. Certiorari denied.

No. 92–1330. MORRIS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 977 F. 2d 677.

No. 92–1351. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 705.

No. 92–1352. PETERSON ET UX. *v.* SOO LINE RAILROAD CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 590.

No. 92–1359. KOUNNAS *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 92–1360. DILLON *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 844 S. W. 2d 139.

No. 92–1362. FOSTVEDT *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1201.

No. 92–1380. WOLAK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 852.

No. 92–5112. PACKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 958 F. 2d 365.

No. 92–6630. CHAKIRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 592.

No. 92–6659. SCOTT *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 148 Ill. 2d 479, 594 N. E. 2d 217.

No. 92–6663. SMITH *v.* LANDON ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–6687. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 756.

No. 92–6733. SIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 183.

No. 92–6776. CHENG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 92–6781. COOPER *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92–6786. CASILLAS *v.* MAYNARD, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 92–6868. PEREZ *v.* STARK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 709.

No. 92–6904. HOLMAN *v.* ASPIN, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 296 U. S. App. D. C. 356, 968 F. 2d 92.

No. 92–6960. WISE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 976 F. 2d 393.

No. 92–6962. RICHEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 353, 595 N. E. 2d 915.

No. 92–6977. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 717.

No. 92–6979. SOMMERLATTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 706.

No. 92–6983. ANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 956 F. 2d 907.

No. 92–6984. SOBAMOWO *v.* PENN, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, ET AL. C. A.

D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 99, 976 F. 2d 47.

No. 92–6988. DARBY *v.* UNITED STATES;
No. 92–7070. GORDON *v.* UNITED STATES;
No. 92–7117. ROBINSON ET AL. *v.* UNITED STATES;
No. 92–7118. MCCLAIN *v.* UNITED STATES;
No. 92–7139. MCCLAIN *v.* UNITED STATES;
No. 92–7150. BAGGS *v.* UNITED STATES;
No. 92–7164. BRIDGES *v.* UNITED STATES;
No. 92–7166. DUKES *v.* UNITED STATES;
No. 92–7186. SMITH *v.* UNITED STATES;
No. 92–7203. STANFORD *v.* UNITED STATES; and
No. 92–7237. FARQUHARSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–7019. STRACHAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 35 M. J. 362.

No. 92–7020. SILVERMAN *v.* UNITED STATES; and
No. 92–7041. CATON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 1502.

No. 92–7043. BUTLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 583.

No. 92–7049. BARRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92–7064. DEWEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 399.

No. 92–7066. GOODMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92–7081. COBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 975 F. 2d 152.

No. 92–7129. TRACY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 92–7155. TOURE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 726.

No. 92–7161. MAYER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 972 F. 2d 1334.

No. 92–7181. DAVENPORT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 23.

No. 92–7182. CLAGGETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 707.

No. 92–7185. SENTER *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 583.

No. 92–7193. POWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 973 F. 2d 885.

No. 92–7202. WAWZJNAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 1249.

No. 92–7225. MCNEILL *v.* BENTSEN, SECRETARY OF THE TREASURY; and

No. 92–7226. MCNEILL *v.* BENTSEN, SECRETARY OF THE TREASURY. C. A. D. C. Cir. Certiorari denied.

No. 92–7233. HARVEY *v.* ORTIZ, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92–7245. CARDOUNEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 569.

No. 92–7269. VILLANUEVA *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1262.

No. 92–7270. BRANTLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92–7271. HANNER *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 710.

No. 92–7274. ABLES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7277. SLABOCHOVA *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–7278. YOUMANS *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–7279. NORRIS *v.* DAVIES, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 596.

No. 92–7280. MOHIUDDIN *v.* USBI CO. C. A. 11th Cir. Certiorari denied.

No. 92–7283. BATES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 604 So. 2d 457.

No. 92–7284. CARRIGER *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 971 F. 2d 329.

No. 92–7286. MARTINEZ *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 172 Ariz. 437, 837 P. 2d 1172.

No. 92–7287. ABNER *v.* ESCAMBIA COUNTY SCHOOL DISTRICT. C. A. 11th Cir. Certiorari denied.

No. 92–7288. COOLEY ET UX. *v.* BROWN ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 607 So. 2d 146.

No. 92–7292. TYNER *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 92–7295. THOMPSON *v.* RILEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 968 F. 2d 17.

No. 92–7296. SHEPARD *v.* WASHINGTON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 92–7298. TURNER *v.* GEORGETOWN UNIVERSITY. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 303, 971 F. 2d 766.

No. 92–7307. MALONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 92–7310. MEADOR *v.* BUNNELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 715.

No. 92–7311. BOWE *v.* NORTHWEST AIRLINES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 974 F. 2d 101.

No. 92–7317. HO *v.* MARTIN MARIETTA AEROSPACE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 710.

No. 92–7319. GUTIERREZ-DIAZ, AKA GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92–7320. JONES *v.* BORG, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 92–7333. HELZER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 440 Mich. 899, 488 N. W. 2d 767.

No. 92–7335. LLOYD *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–7336. MEJIA *v.* MYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 715.

No. 92–7337. RAY *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 596.

No. 92–7338. SANGSTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 726.

No. 92–7339. SPATES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 721.

No. 92–7342. YOUNG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 979 F. 2d 1280.

No. 92–7344. CLARK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 41, 833 P. 2d 561.

No. 92–7345. PACHECO SUAREZ *v.* KANSAS DEPARTMENT OF SOCIAL REHABILITATION SERVICES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1267.

No. 92–7347. VAHEDI *v.* BURLEY ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 92–7348. ADAMS *v.* LOS ANGELES SUPERIOR COURT SYSTEM ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1336.

No. 92–7349. BYRD *v.* BEARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–7350. BAUGE *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 356.

No. 92–7361. MURO-JUAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 710.

No. 92–7368. COOPER *v.* LOMBARDI ET AL. Cir. Ct. Cole County, Mo. Certiorari denied.

No. 92–7373. ZIEBARTH *v.* FEDERAL LAND BANK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 867.

No. 92–7376. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 1133.

No. 92–7381. ALOI *v.* WARD. Sup. Ct. Ohio. Certiorari denied.

No. 92–7385. HARGROVE *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–7392. SYLVESTRE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 978 F. 2d 25.

No. 92–7393. COOPER *v.* HAWLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–7396. HARVEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1345.

No. 92–7400. CLARKE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–7401. ESNAULT *v.* COLORADO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 980 F. 2d 1335.

No. 92–7405. FOSTER *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 838 S. W. 2d 60.

No. 92–7407. HALLORAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 716.

No. 92–7414. RUSSELL *v.* PUCKETT, DIRECTOR, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 969 F. 2d 1045.

No. 92–7416. PORTER *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 576 N. E. 2d 651.

No. 92–7417. LANIER *v.* HAYNES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 737.

No. 92–7419. TURNER *v.* MARKS, ATTORNEY GENERAL OF HAWAII, ET AL. Sup. Ct. Haw. Certiorari denied.

No. 92–7422. SAVINO *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Va. Certiorari denied.

No. 92–7429. GREEN *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1066.

No. 92–7440. KOESTER *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–7443. BENTLEY *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 92–7446. HOULE ET UX. *v.* ALLSTATE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1221.

No. 92–7457. MATHENIA *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 444.

No. 92–7460. NARA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 532 Pa. 643, 614 A. 2d 1140.

No. 92–7465. NGUYEN *v.* EVANS. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 848.

No. 92–7474. MCGINTY *v.* RUE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 737.

No. 92–7475. PENICK *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 1331.

No. 92–7476. LIGGINS *v.* ARMONTROUT, ASSISTANT DIRECTOR, MISSOURI DIVISION OF ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied.

No. 92–7479. Basco *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1255.

No. 92–7480. Clarke *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 839 S. W. 2d 92.

No. 92–7485. Johnson *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 616 A. 2d 1216.

No. 92–7490. Vroman *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 975 F. 2d 669.

No. 92–7492. Perry *v.* Alabama. Sup. Ct. Ala. Certiorari denied.

No. 92–7494. Maxwell *v.* Russi, Chairman, Parole Board of New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 846.

No. 92–7496. Smith *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 92–7500. Propes *v.* Trigg, Superintendent, Indiana Youth Center. C. A. 7th Cir. Certiorari denied.

No. 92–7502. Mount *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 92–7510. Carter *v.* Department of Justice et al. C. A. 9th Cir. Certiorari denied.

No. 92–7512. Ray *v.* Hosking, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1259.

No. 92–7516. Williams *v.* Armontrout, Warden. C. A. 8th Cir. Certiorari denied.

No. 92–7517. Self *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 1198.

No. 92–7518. Taylor *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1260.

No. 92–7523. Coulthrust *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 309, 979 F. 2d 248.

No. 92–7525. Savage *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 717 and 1136.

No. 92–7526. Yudice *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 174.

No. 92–7527. Olson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1472.

No. 92–7531. Dewyea *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1256.

No. 92–7533. Copado *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 111.

No. 92–7534. Hale *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1016.

No. 92–7535. Morris *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1472.

No. 92–7536. Nueva *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 979 F. 2d 880.

No. 92–7546. Acosta-Aceveda *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 979 F. 2d 858.

No. 92–7553. Jackson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1447.

No. 92–7555. Hanna *v.* Arizona. Ct. App. Ariz. Certiorari denied. Reported below: 173 Ariz. 30, 839 P. 2d 450.

No. 92–7566. Austin *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 70 F. 3d 1282.

No. 92–7568. Nero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92–7572. Parsee *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 709.

No. 92–7575. Beatty *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 309, 979 F. 2d 248.

No. 92–7578. Ingram *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 1179.

No. 92–7579. HUMPHREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 213.

No. 92–7583. DUMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 1266.

No. 92–7584. CROCKETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 1204.

No. 92–7585. LEMONS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 849.

No. 92–7590. LOWERY *v.* YOUNG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 351.

No. 92–7593. MONACO *v.* ARMSTRONG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 586.

No. 92–7595. FELDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 975 F. 2d 1225.

No. 92–7596. HINES *v.* VANDERBILT UNIVERSITY MEDICAL CENTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–7604. MESTERINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 707.

No. 92–7605. BLALOCK *v.* ENDELL, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 1255.

No. 92–7616. CANTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 963.

No. 92–7623. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 599.

No. 92–7624. GRANT *v.* UNITED STATES;
No. 92–7633. CLAVIS *v.* UNITED STATES; and
No. 92–7658. GREENE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 956 F. 2d 1079 and 977 F. 2d 538.

No. 92–7626. GABE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 974 F. 2d 246.

No. 92–7627. PRESTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 607 So. 2d 404.

No. 92–7628. LARRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1082.

No. 92–7629. ROSARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 845.

No. 92–7630. RUSSELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 975 F. 2d 1225.

No. 92–7631. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 171.

No. 92–7634. COLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 980 F. 2d 731.

No. 92–7635. WALSH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1534.

No. 92–7636. CALABRESE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 1249.

No. 92–7637. CHESTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1534.

No. 92–7638. STRAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 972 F. 2d 357.

No. 92–7640. SPENCER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1533.

No. 92–7642. THIELE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–7649. MENDOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92–7653. ROBINSON *v.* ARVONIO, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 975 F. 2d 1551.

No. 92–7657. HONEYBLUE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1256.

No. 92–7668. FRENCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 1266.

No. 92–7671. DUGAZON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1538.

No. 92–7679. MCCRAVY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 210.

No. 92–7684. BANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1534.

No. 92–7689. HEBESTREIT *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 850.

No. 92–7692. JONES *v.* THOMAS. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–7694. GROSSMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 706.

No. 92–7695. SORRELLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 731.

No. 92–7704. DAHLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 575.

No. 92–7706. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 1249.

No. 92–7708. CANUL-BASTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92–7732. MILLER *v.* MILLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1067.

No. 92–7743. BRYDGES *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 92–916. NEBRASKA *v.* HICKS. Sup. Ct. Neb. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 241 Neb. 357, 488 N. W. 2d 359.

No. 92–1232. FORD, WARDEN *v.* HAMILTON. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 969 F. 2d 1006.

No. 92–1189. COLUMBUS-AMERICA DISCOVERY GROUP, INC. *v.* ATLANTIC MUTUAL INSURANCE CO. ET AL. C. A. 4th Cir. Motions for leave to file briefs as *amici curiae* filed by the following are granted: National Association of Academies of Science, Florida Bar Admiralty Law Committee, Ohio State University, Columbus Museum of Art, Ohio Academy of Science, Teachers and Administrators of Secondary Schools et al., Explorers Club, Battelle Memorial Institute, Marine Technology Society, Ohio Historical Society, National Maritime Historical Society, Titanic International, Inc., et al., and Adjunct Science and Education Association. Certiorari denied. Reported below: 974 F. 2d 450.

No. 92–1219. LEIGHTON *v.* DREXEL BURNHAM LAMBERT GROUP, INC., ET AL. C. A. 2d Cir. Motion of petitioner to strike brief in opposition denied. Certiorari denied.

No. 92–1306. ALAMO *v.* MILLER ET AL. C. A. 8th Cir. Motion of Susan Groulx et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 980 F. 2d 735.

No. 92–6546. CALDWELL *v.* SECRETARY OF VETERANS AFFAIRS ET AL. C. A. Fed. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 975 F. 2d 870.

No. 92–6727. BAKER *v.* DEPARTMENT OF THE ARMY. C. A. D. C. Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 298 U. S. App. D. C. 97, 976 F. 2d 45.

No. 92–7352. VAN DER JAGT *v.* UNITED STATES CONGRESS. C. A. 5th Cir. Certiorari before judgment denied.

No. 92–8060 (A–717). SANTANA *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 90–1122. GOLOCHOWICZ *v.* GRAYSON, WARDEN, CHARLES EGELER CORRECTIONAL FACILITY, 501 U. S. 1250;

No. 91–7328. HERRERA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 506 U. S. 390;

No. 91–8001. INGRAM *v.* SMITH, WARDEN, 504 U. S. 929;

No. 92–802. O'LEARY *v.* CITY OF SACRAMENTO ET AL., 506 U. S. 1052;

No. 92-853. SANDERS CONFECTIONERY PRODUCTS INC. ET AL. *v.* HELLER FINANCIAL, INC., ET AL., 506 U. S. 1079;

No. 92-890. GUINN *v.* TEXAS CHRISTIAN UNIVERSITY ET AL., 506 U. S. 1081;

No. 92-6111. GENTRY *v.* TEXAS, 506 U. S. 1083;

No. 92-6482. DEMPSEY *v.* WTLK TV 14 ROME/ATLANTA ET AL., 506 U. S. 1060;

No. 92-6675. ROBERTS *v.* WESTERN MANAGEMENT SYSTEMS ET AL., 506 U. S. 1084;

No. 92-6740. CURIALE ET UX. *v.* HICKEL, GOVERNOR OF ALASKA, ET AL., 506 U. S. 1085; and

No. 92-8060. SANTANA *v.* TEXAS, *ante*, p. 1001. Petitions for rehearing denied.

MARCH 23, 1993

Certiorari Denied

No. 92-8064 (A-721). SANTANA *v.* RICHARDS, GOVERNOR OF TEXAS, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 990 F. 2d 625.

MARCH 24, 1993

Certiorari Denied

No. 92-8089 (A-729). MONTOYA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 988 F. 2d 11.

MARCH 29, 1993

Miscellaneous Orders

No. ——–—. HEMMERLE *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SUNRISE SAVINGS & LOAN ASSN., ET AL. Motion to direct the Clerk to treat the notice of appeal as a petition for writ of certiorari and to file the petition denied.

No. A-446. HILLS *v.* UNITED STATES. Application for bond, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D-1219. In re Disbarment of Babic. Disbarment entered. [For earlier order herein, see 506 U. S. 1045.]

No. D-1251. In re Disbarment of Gourley. It is ordered that Joseph D. J. Gourley, of Wayne, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92-6849. Betka *v.* A-T Industries, Inc., et al. Sup. Ct. Ore. Motion for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 906] denied.

No. 92-7589. LaChance et ux. *v.* Federal Deposit Insurance Corporation. C. A. 5th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 19, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 92-1337. In re Branson;
No. 92-7537. In re McKinzy; and
No. 92-7761. In re Rettig. Petitions for writs of mandamus denied.

Certiorari Granted

No. 92-1223. United States Department of Defense et al. *v.* Federal Labor Relations Authority et al. C. A. 5th Cir. Certiorari granted. Reported below: 975 F. 2d 1105.

No. 92-1292. Campbell, aka Skyywalker, et al. *v.* Acuff-Rose Music, Inc. C. A. 6th Cir. Motion of Capitol Steps Productions, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari granted limited to the following question: "Whether petitioners' commercial parody was a 'fair use' within the meaning of 17 U. S. C. § 107?" Reported below: 972 F. 2d 1429.

Certiorari Denied

No. 92-960. McAusland et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 970.

No. 92-970. Woods Petroleum Corp. *v.* Cheyenne-Arapaho Tribes of Oklahoma et al.; and

No. 92–1286. CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA *v.* WOODS PETROLEUM CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 966 F. 2d 583.

No. 92–996. LINNE ET AL. *v.* RIDEOUTTE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 303, 971 F. 2d 766.

No. 92–1110. WELLIVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 976 F. 2d 1148.

No. 92–1129. CHENG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 970 F. 2d 1397 and 978 F. 2d 879.

No. 92–1142. CHARTER FEDERAL SAVINGS BANK *v.* DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 203.

No. 92–1144. IMAGINEERING, INC., ET AL. *v.* KIEWIT PACIFIC CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 1303.

No. 92–1145. SASSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 967 F. 2d 993.

No. 92–1151. UNSECURED CREDITORS' COMMITTEE OF C–T OF VIRGINIA, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 137.

No. 92–1156. HURST ET AL. *v.* WILSON. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 1263.

No. 92–1170. ATKINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 966 F. 2d 1270.

No. 92–1293. NATIONWIDE CORP. ET AL. *v.* HOWING CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 700.

No. 92–1298. SAN FRANCISCO POLICE OFFICERS ASSN. *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 721.

No. 92–1301. YOUMANS *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 575.

No. 92-1304. WOOLUM *v.* BANK ONE, LEXINGTON, N. A. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 71.

No. 92-1305. DOUGHBOY RECREATIONAL, INC., A DIVISION OF HOFFINGER INDUSTRIES, INC. *v.* FLECK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 107.

No. 92-1311. BRANSON *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1337.

No. 92-1312. LIBERTY MUTUAL INSURANCE CO. ET AL. *v.* ELJER MANUFACTURING, INC., FKA HOUSEHOLD MANUFACTURING, INC. C. A. 7th Cir. Certiorari denied. Reported below: 972 F. 2d 805.

No. 92-1317. BOYLE *v.* SCHMITT, INDIVIDUALLY AND AS ANCILLARY PERSONAL REPRESENTATIVE OF THE ESTATE OF BOYLE, DECEASED, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 602 So. 2d 665.

No. 92-1318. TEXAS *v.* WILKENS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 847 S. W. 2d 547.

No. 92-1321. MCCAW *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 418 Pa. Super. 634, 606 A. 2d 1231.

No. 92-1323. UNITED TRANSPORTATION UNION *v.* CUYAHOGA VALLEY RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 431.

No. 92-1326. HETZNER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 92-1327. MANATT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 311 Ark. 17, 842 S. W. 2d 845.

No. 92-1328. GORDON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 608 So. 2d 800.

No. 92-1329. PARTEE ET AL. *v.* HOUSTON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 362.

No. 92-1332. CAPTRAN CREDITORS' TRUST CLUB BAHA, LTD., ET AL. *v.* MCCONNELL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–1333. Hall, dba 721 Associates et al. *v.* Minnesota. Sup. Ct. Minn. Certiorari denied. Reported below: 491 N. W. 2d 882.

No. 92–1335. Mona *v.* Citizens Bank & Trust Company of Maryland et al. C. A. 4th Cir. Certiorari denied.

No. 92–1340. Perlmutter *v.* Perlmutter. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 225 Ill. App. 3d 362, 587 N. E. 2d 609.

No. 92–1342. California *v.* Wilson (two cases). Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 926, 838 P. 2d 1212 (first case); 3 Cal. 4th 945, 838 P. 2d 1222 (second case).

No. 92–1345. Platzer et al. *v.* Sloan-Kettering Institute for Cancer Research. C. A. Fed. Cir. Certiorari denied. Reported below: 983 F. 2d 1086.

No. 92–1356. Smith *v.* City of Boston. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 413 Mass. 607, 602 N. E. 2d 198.

No. 92–1357. Nieves et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 152.

No. 92–1371. Arizona *v.* Swanson. Ct. App. Ariz. Certiorari denied. Reported below: 172 Ariz. 579, 838 P. 2d 1340.

No. 92–1373. Norris et al. *v.* Harbin et al. Sup. Ct. Ala. Certiorari denied. Reported below: 615 So. 2d 65.

No. 92–1385. Edwards *v.* King, Acting Director, Office of Personnel Management. C. A. Fed. Cir. Certiorari denied. Reported below: 983 F. 2d 1086.

No. 92–1404. Levy *v.* Brown, Secretary of Veterans Affairs, et al. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92–1406. Nette *v.* Eastern Sheet Metal, Inc. Ct. App. Tenn. Certiorari denied.

No. 92–6593. Washington *v.* Koenig et al. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 596.

No. 92–6735. Willis *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 970 F. 2d 494.

No. 92–6770. Moore *v.* Zant, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 318.

No. 92–6775. Tomlinson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–7084. Masters *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 849.

No. 92–7104. Hill *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 313, 595 N. E. 2d 884.

No. 92–7148. Fauber *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 792, 831 P. 2d 249.

No. 92–7162. White *v.* United States; and
No. 92–7184. Wilson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 590.

No. 92–7235. Elliott *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 574.

No. 92–7428. Graham *v.* Fordice, Governor of Mississippi, et al. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 232.

No. 92–7432. Jones *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 236 Ill. App. 3d 244, 603 N. E. 2d 619.

No. 92–7434. Johnson *v.* Hargett, Superintendent, Mississippi State Penitentiary. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 855.

No. 92–7435. Allustiarte et al. *v.* Rudnick et al. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1343.

No. 92–7442. Parez *v.* General Atomics. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 737.

No. 92–7448. Lawson *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 336, 595 N. E. 2d 902.

No. 92–7462. Mallon *v.* United States District Court et al. C. A. 3d Cir. Certiorari denied.

No. 92–7463. Mallon *v.* United States Attorney for Eastern District of Pennsylvania. C. A. 3d Cir. Certiorari denied.

No. 92–7464. London *v.* Haws, Warden. C. A. 7th Cir. Certiorari denied.

No. 92–7467. Lucien *v.* Read et al. C. A. 7th Cir. Certiorari denied.

No. 92–7470. Cummings *v.* United States Postal Service. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 745.

No. 92–7473. Moritz *v.* Missouri et al. C. A. 8th Cir. Certiorari denied. Reported below: 995 F. 2d 226.

No. 92–7477. Swenson *v.* Caspari, Superintendent, Missouri Eastern Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 92–7489. Williams *v.* Whitley, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 708.

No. 92–7495. Shabazz *v.* Kaiser, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 529.

No. 92–7501. Magee *v.* United States District Court for the Northern District of California et al. C. A. 9th Cir. Certiorari denied.

No. 92–7509. Clayton *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 840 P. 2d 18.

No. 92–7515. Marinoff *v.* A. F. A. Asset Service, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 962 F. 2d 4.

No. 92–7528. Napper *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 420 Pa. Super. 639, 610 A. 2d 66.

No. 92–7529. Mulville *v.* Spurgeon's of Iowa, Inc. Ct. App. Iowa. Certiorari denied. Reported below: 495 N. W. 2d 785.

No. 92-7538. OMOIKE *v.* GSX LAND TREATMENT CO. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1064.

No. 92-7548. WELLS *v.* ORGILL BROTHERS & CO. Sup. Ct. Tenn. Certiorari denied.

No. 92-7552. GUY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 770, 839 P. 2d 578.

No. 92-7558. JOHNSON *v.* WALGREEN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 980 F. 2d 721.

No. 92-7559. SALAZAR CARDENAS *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 92-7564. BURNS *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92-7569. MARSHALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 658.

No. 92-7580. ANDREWS *v.* BRIGHT. C. A. 8th Cir. Certiorari denied.

No. 92-7581. CHANDLER *v.* LOMBARDI ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1263.

No. 92-7582. D'AMARIO *v.* O'NEIL, ATTORNEY GENERAL OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied.

No. 92-7586. NEWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 583.

No. 92-7588. MARTINEZ *v.* TURNER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 421.

No. 92-7592. LOPEZ *v.* SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied.

No. 92-7609. WHITEHEAD *v.* BRADLEY UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied.

No. 92-7610. SEPULVEDA-AQUERRE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92-7611. SAINTKITTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 213.

No. 92–7613. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 92–7645. PEDRO *v.* SCHIEDLER, SUPERINTENDENT, OREGON WOMEN'S CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 855.

No. 92–7656. BARTRUG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 727.

No. 92–7702. HARRIS *v.* UNITED STATES; and
No. 92–7773. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–7707. BUCHANAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1350.

No. 92–7709. ARRINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 849.

No. 92–7711. BOWEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–7712. BROXSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 595.

No. 92–7716. DUROCHER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 604 So. 2d 810.

No. 92–7718. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92–7719. FRAZIER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 92.

No. 92–7720. HERNANDEZ-ARCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 592.

No. 92–7722. BILLINGSLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 861.

No. 92–7723. CANTY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 849.

No. 92–7730. CHARLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 92–7734. ROBELIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–7735. RAINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 1148.

No. 92–7736. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1538.

No. 92–7737. OLIVA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 1249.

No. 92–7738. PETTUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 92.

No. 92–7739. ALLIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 1401.

No. 92–7745. JANSKY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–7750. COLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–7751. MCCURDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92–7752. POPE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–7753. LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 849.

No. 92–7757. COLEMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–7758. SIMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1533.

No. 92–7762. CARABALLO ORTIZ *v.* BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–7769. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1534.

No. 92–7771. ISCHY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 556.

No. 92–7772. FRAGOSO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 896.

No. 92–7775. PIERRE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 5, 974 F. 2d 1355.

No. 92–7776. MORALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1007.

No. 92–7777. PULLAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 656.

No. 92–7782. ZORRILLA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 982 F. 2d 28.

No. 92–7791. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 92–7799. NETELKOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 983 F. 2d 1053.

No. 92–7804. ROBERTSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

Rehearing Denied

No. 92–747. MCCOLLOUGH ET UX. *v.* A. G. EDWARDS & SONS, INC., 506 U. S. 1050;

No. 92–6256. MCFARLAND *v.* BETHLEHEM STEEL CORP. ET AL., 506 U. S. 1083;

No. 92–6869. LAFLAMME *v.* SPECTOR ET AL., *ante,* p. 930;

No. 92–6943. RODRIGUEZ *v.* KINCHELOE, *ante,* p. 933;

No. 92–7027. FERDIK *v.* WOODS, ATTORNEY GENERAL OF ARIZONA, ET AL., *ante,* p. 937;

No. 92–7115. MCAFEE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante,* p. 942; and

No. 92–7175. DESHIELDS *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, *ante,* p. 944. Petitions for rehearing denied.

No. 92–948. PHELPS *v.* CARLSON, WARDEN, ET AL., 506 U. S. 1072. Petition for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 92-6310. SOMES *v.* UNITED STATES, 506 U. S. 1009. Motion of petitioner for leave to file petition for rehearing denied.

APRIL 1, 1993

Dismissal Under Rule 46

No. 92-1470. HUGHES AIRCRAFT CO. *v.* COFFEY. Ct. App. Cal., 2d App. Dist. Certiorari dismissed under this Court's Rule 46.

APRIL 2, 1993

Miscellaneous Order

No. A-742. FARGO WOMEN'S HEALTH ORGANIZATION ET AL. *v.* SCHAFER, GOVERNOR OF NORTH DAKOTA, ET AL. D. C. N. D. Application for stay and injunction pending appeal, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. The order heretofore entered by JUSTICE BLACKMUN on March 31, 1993, is vacated. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER joins, concurring.

Applicants challenged certain provisions of the North Dakota Abortion Control Act, N. D. Cent. Code §§ 14-02.1-01 to 14-02.1-12 (1991), in the United States District Court for the District of North Dakota. Relying on our decision in *United States* v. *Salerno,* 481 U. S. 739 (1987), the District Court granted summary judgment against applicants. The court reasoned that applicants could not mount a successful facial challenge because they were unable to show that "'no set of circumstances exists under which the [challenged provisions] would be valid.'" *Fargo Women's Health Organization* v. *Skinner,* No. A3-91-95 (Feb. 19, 1993) (quoting *Salerno, supra,* at 745). The court denied applicants' motion for a stay and injunction pending appeal. See *Fargo Women's Health Organization* v. *Schafer,* No. A3-91-95 (Mar. 9, 1993). The Court of Appeals for the Eighth Circuit also denied a motion for stay and injunction pending appeal. It agreed with the District Court that the *Salerno* standard applied and concluded that this Court's decision last Term in *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992), did not counsel a different approach. See *Fargo Women's Health Organization*

v. *Schafer,* No. 93–1579 (Mar. 30, 1993). The appeal was expedited, and argument is scheduled for April 14, 1993.

Applicants now ask us for a stay of the District Court's judgment and for injunctive relief. When a matter is pending before a court of appeals, it long has been the practice of Members of this Court to grant stay applications only "upon the weightiest considerations." *O'Rourke* v. *Levine,* 80 S. Ct. 623, 624, 4 L. Ed. 2d 615, 616 (1960) (Harlan, J., in chambers). Accord, *Certain Named and Unnamed Non-Citizen Children and Their Parents* v. *Texas,* 448 U. S. 1327, 1330 (1980) (Powell, J., in chambers); see also *Heckler* v. *Redbud Hospital Dist.,* 473 U. S. 1308, 1312 (1985) (REHNQUIST, J., in chambers) ("[A] stay application to a Circuit Justice on a matter before a court of appeals is rarely granted" (internal quotation marks omitted)); *Heckler* v. *Lopez,* 464 U. S. 879, 884 (1983) (STEVENS, J., joined by BLACKMUN, J., dissenting in part) ("[I]n such a case the granting of a stay by a Circuit Justice should be extremely rare and great deference should be shown to the judgment of the Court of Appeals"). Consistent with that practice, I vote to deny the stay application. I do not believe applicants have demonstrated that this is one of those rare and exceptional cases in which a stay pending appeal is warranted.

I write separately, however, to point out that our denial of relief should not be viewed as signaling agreement with the lower courts' reasoning. In my view, the approach taken by the lower courts is inconsistent with *Casey.* In striking down Pennsylvania's spousal-notice provision, we did not require petitioners to show that the provision would be invalid in *all* circumstances. Rather, we made clear that a law restricting abortions constitutes an undue burden, and hence is invalid, if, "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Casey,* 505 U. S., at 895. And the joint opinion specifically examined the record developed in the District Court in determining that Pennsylvania's informed-consent provision did not create an undue burden. See *id.,* at 885–887 (opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). While I express no view as to whether the particular provisions at issue in this case constitute an undue burden, I believe the lower courts should have undertaken the same analysis.

APRIL 5, 1993

Affirmed on Appeal

No. 92–1249. AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC., ET AL. *v.* BLUNT ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 797 F. Supp. 1488.

Certiorari Granted—Vacated and Remanded

No. 91–1800. HARLOW FAY, INC. *v.* FEDERAL LAND BANK OF ST. LOUIS. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership, ante,* p. 380. Reported below: 951 F. 2d 175.

No. 91–1855. PEARSON ET AL. *v.* EDGAR, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cincinnati* v. *Discovery Network, Inc., ante,* p. 410. Reported below: 955 F. 2d 46.

Miscellaneous Orders

No. A–734. RESERVE NATIONAL INSURANCE CO. *v.* CROWELL ET UX. Application for stay, presented to JUSTICE KENNEDY, and by him referred to the Court, granted, and it is ordered that execution upon the punitive damages portion of the judgment entered February 5, 1993, by the Supreme Court of Alabama, case Nos. 1911098, 1911099, and 1911157, is stayed pending the timely filing and disposition by this Court of a petition for writ of certiorari. If the petition for writ of certiorari is denied, this order is to terminate automatically. Should the petition for writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court.

No. D–1252. IN RE DISBARMENT OF LEBETKIN. It is ordered that Melvin M. Lebetkin, of Kew Gardens, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1253. IN RE DISBARMENT OF PERRIN. It is ordered that Richard Preston Perrin, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1254. In re Disbarment of Bodner. It is ordered that Howard J. Bodner, of Rockville Centre, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1255. In re Disbarment of Rightmyer. It is ordered that Larry G. Rightmyer, of St. Petersburg, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 119, Orig. Connecticut et al. *v.* New Hampshire. Motion of Massachusetts for divided argument and for additional time for oral argument denied. Motion of intervenors United Illuminating Co. et al. for divided argument granted to be divided as follows: 20 minutes for the plaintiffs and 10 minutes for the intervenors. Justice Souter took no part in the consideration or decision of these motions. [For earlier order herein, see, *e. g., ante,* p. 970.]

No. 92–515. Wisconsin *v.* Mitchell. Sup. Ct. Wis. [Certiorari granted, 506 U. S. 1033.] Motion of respondent for divided argument denied.

No. 92–602. St. Mary's Honor Center et al. *v.* Hicks. C. A. 8th Cir. [Certiorari granted, 506 U. S. 1042.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–6033. McNeil *v.* United States. C. A. 7th Cir. [Certiorari granted, 506 U. S. 1074.] Motion of the Acting Solicitor General to permit William K. Kelley, Esq., to present oral argument *pro hac vice* granted.

No. 92–7894. Restrepo *v.* United States. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until April 26, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. Justice Blackmun and Justice Stevens would deny the petition for writ of certiorari.

No. 92–7912. In re Miller. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until April 26, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 92–7619. In re Searcy. C. A. 5th Cir. Petition for writ of common-law certiorari before judgment denied.

No. 92–7904. In re Gray; and
No. 92–7937. In re Gregory. Petitions for writs of habeas corpus denied.

Certiorari Denied. (See also No. 92–7619, *supra.*)

No. 91–956. Gerding, Administrator of the Estate of Gerding, Deceased, et al. *v.* Republic of France et al. C. A. 4th Cir. Certiorari denied. Reported below: 943 F. 2d 521.

No. 92–320. Republic of Argentina et al. *v.* Siderman de Blake et al. C. A. 9th Cir. Certiorari denied. Reported below: 965 F. 2d 699.

No. 92–964. Collins *v.* United States; and
No. 92–6813. Ross *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 1385.

No. 92–1055. Shockey *v.* City of Portland et al. Sup. Ct. Ore. Certiorari denied. Reported below: 313 Ore. 414, 837 P. 2d 505.

No. 92–1084. Gordon et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 586.

No. 92–1095. Lonetree *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 35 M. J. 396.

No. 92–1127. Helton et al. *v.* Federal Deposit Insurance Corporation, Receiver for Victor Savings & Loan Assn. Ct. App. Okla. Certiorari denied.

No. 92–1177. Myers *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1566.

No. 92–1179. Kahn *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 593.

No. 92–1186. WATERS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 1310.

No. 92–1261. ANTOINE ET AL. *v.* CALIFORNIA COASTAL COMMISSION. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–1262. BURRELL *v.* BOARD OF TRUSTEES OF GEORGIA MILITARY COLLEGE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 970 F. 2d 785.

No. 92–1266. LEIZERMAN *v.* TOLEDO BAR ASSN. Sup. Ct. Ohio. Certiorari denied. Reported below: 64 Ohio St. 3d 669, 597 N. E. 2d 1104.

No. 92–1278. MORALES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS *v.* TEXAS CATASTROPHE PROPERTY INSURANCE ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 975 F. 2d 1178.

No. 92–1279. BERGER *v.* BOARD OF REGENTS OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 178 App. Div. 2d 748, 577 N. Y. S. 2d 500.

No. 92–1310. BAGHDADY *v.* SADLER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 974 F. 2d 1329.

No. 92–1343. JOHNSON *v.* WHITE ET AL. (BANK OF AMERICA, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 587.

No. 92–1344. LOWERY *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1348.

No. 92–1353. LEWIS *v.* SOUTH CAROLINA FREIGHT ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 602 So. 2d 1149.

No. 92–1355. FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL. *v.* WILLIAMS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 979 F. 2d 858.

No. 92–1369. ALBERICI ET UX. *v.* SAFEGUARD MUTUAL INSURANCE CO. ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 416 Pa. Super. 649, 601 A. 2d 1296.

No. 92–1374. MILLER *v.* REDEVELOPMENT AUTHORITY OF WASHINGTON COUNTY, PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 147 Pa. Commw. 169, 607 A. 2d 311.

No. 92–1387. MCNUTT *v.* GTE FLORIDA, INC. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 608 So. 2d 816.

No. 92–1409. GACKENBACH *v.* UNIROYAL, INC. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 723.

No. 92–1416. CRAWFORD *v.* LANDMARKS GROUP PROPERTIES CORP. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. XXVIII, 422 S. E. 2d 662.

No. 92–1429. MCGAUGHEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 1067.

No. 92–1460. COFFIN ET AL. *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 563.

No. 92–5444. HARRISON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581.

No. 92–5570. KENNEDY ET VIR *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 63 Ohio St. 3d 353, 588 N. E. 2d 116.

No. 92–5956. ADAMS *v.* PETERSON, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 835.

No. 92–6768. WESTMORELAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 736.

No. 92–6784. PATTEN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 598 So. 2d 60.

No. 92–6851. WALKINGEAGLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 974 F. 2d 551.

No. 92–6886. OSPINA-BORJA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied.

No. 92–7012. LAMBERT *v.* MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1334.

No. 92–7067. GREEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 840 S. W. 2d 394.

No. 92–7218. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92–7315. LATTIMORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 974 F. 2d 971.

No. 92–7334. MCQUEEN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 92–7483. ARNOLD *v.* RESOLUTION TRUST CORPORATION. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 525.

No. 92–7540. DENTON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 92–7541. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 960 F. 2d 147.

No. 92–7542. CORNELL *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 976 F. 2d 376.

No. 92–7543. SMITH *v.* STAINER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 591.

No. 92–7544. BREVELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 553.

No. 92–7547. WILSON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 92–7556. HARRIS *v.* IEYOUB, ATTORNEY GENERAL OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 209.

No. 92–7563. HEIMBAUGH *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. (two cases). C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 589.

No. 92–7565. CATALFO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 897.

No. 92–7574. BRIGHT *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1055.

No. 92–7587. RODOLICO *v.* RAUCH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 1248.

No. 92–7591. MORRISON *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 577.

No. 92–7594. MUHAMMAD *v.* DOMOVICH, SUPERINTENDENT, PENNSYLVANIA STATE CORRECTIONAL INSTITUTION. C. A. 3d Cir. Certiorari denied.

No. 92–7597. SPEARMAN *v.* EPPS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 925.

No. 92–7598. HARRISON *v.* PADILLA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1258.

No. 92–7599. GOODWIN *v.* WELLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 850.

No. 92–7600. BRYANT ET AL. *v.* WHALEN ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–7606. JEWELL *v.* HIGGINS ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–7608. JAAKKOLA *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–7612. HARTER *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 92–7614. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 92–7615. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 92–7622. EXLER *v.* SIZZLER FAMILY STEAKHOUSES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92-7651. LYONS *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1340.

No. 92-7675. BELL *v.* SOUTH CAROLINA. Ct. Common Pleas of Saluda County, S. C. Certiorari denied.

No. 92-7681. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 979 F. 2d 1424.

No. 92-7699. DELAY *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92-7728. FISHER *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 737.

No. 92-7731. FOSTER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 968 F. 2d 1221.

No. 92-7733. REYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 1048.

No. 92-7740. WILLIAMS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92-7744. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92-7747. IVY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 1184.

No. 92-7748. HELZER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 441 Mich. 853, 489 N. W. 2d 479.

No. 92-7754. MEADOWS *v.* MORRIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 980 F. 2d 730.

No. 92-7755. MAYS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92-7786. HARRIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 612 A. 2d 198.

No. 92–7790. Carter *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 981 F. 2d 645.

No. 92–7796. Mackey *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 530.

No. 92–7820. Miller et al. *v.* Toombs, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 560.

No. 92–7825. Mayser-Pereira *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 743.

No. 92–7832. Casares *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 719.

No. 92–7833. Barton *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92–7836. Martinez-De Leon *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 208.

No. 92–7837. Pandey *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 979 F. 2d 844.

No. 92–7840. Rumph *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–7841. Revel *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 656.

No. 92–7845. Stein *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 740.

No. 92–7846. Mays *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 319.

No. 92–7849. Palmer *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–7850. Rose *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1447.

No. 92–7853. Medley *v.* Maryland. Ct. Sp. App. Md. Certiorari denied. Reported below: 92 Md. App. 750.

No. 92–7857. Woodman *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 740.

No. 92-7860. FIORE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 983 F. 2d 1.

No. 92-7863. KUEHL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92-7866. RESENDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1260.

No. 92-7867. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92-7869. DENSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 742.

No. 92-7870. DAVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1533.

No. 92-7874. GIRALDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92-7878. GOLDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1260.

No. 92-7881. DOMINGUEZ-VALTIERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92-7889. MONTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 235.

No. 92-7891. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1079.

No. 92-7892. LAFRADEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92-7982. KAIRYS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 981 F. 2d 937.

No. 92-1083. PHELPS *v.* SOVRAN BANK. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 974 F. 2d 1331.

No. 92-1104. MARYLAND *v.* WATTERS. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 328 Md. 38, 612 A. 2d 1288.

No. 92–1372. ELLERBEE *v.* MILLS. Sup. Ct. Ga. Motion of Atlanta Journal-Constitution for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 262 Ga. 516, 422 S. E. 2d 539.

No. 92–6852. LONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 963 F. 2d 379.

Rehearing Denied

No. 92–681. NOVOTNY *v.* UNITED STATES, *ante*, p. 909;
No. 92–1122. POLYAK *v.* COMMISSIONER OF INTERNAL REVENUE ET AL., *ante*, p. 919;
No. 92–5907. BETKA *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., *ante*, p. 922;
No. 92–6591. SEWELL *v.* UNITED STATES, *ante*, p. 953;
No. 92–6844. DUVALL *v.* DUVALL ET AL., *ante*, p. 929;
No. 92–6898. NELSON *v.* CITY OF TUSCALOOSA ET AL., *ante*, p. 931;
No. 92–6926. HERMAN *v.* DEPARTMENT OF THE TREASURY ET AL., *ante*, p. 932;
No. 92–7004. ESTUS *v.* LYNN, *ante*, p. 936;
No. 92–7053. BRYSON *v.* BESSINGER, WARDEN, ET AL., *ante*, p. 938;
No. 92–7087. NAMER *v.* FEDERAL TRADE COMMISSION, *ante*, p. 940; and
No. 92–7144. KELLEY ET AL. *v.* GONZALEZ ET AL., *ante*, p. 943. Petitions for rehearing denied.

APRIL 6, 1993

Dismissal Under Rule 46

No. 92–851. LEU TRUST & BANKING (BAHAMAS) LTD. ET AL. *v.* HERCULES INC. Sup. Ct. Del. Certiorari dismissed under this Court's Rule 46.1. Reported below: 611 A. 2d 476.

APRIL 12, 1993

Dismissal Under Rule 46

No. 91–2086. GRANITE STATE INSURANCE CO. *v.* TANDY CORP. ET AL. C. A. 5th Cir. [Certiorari granted, 506 U. S. 813.*] Writ of certiorari dismissed under this Court's Rule 46.

APRIL 13, 1993

Certiorari Denied

No. 92–8305 (A–783). CLARK *v.* ARIZONA. Sup. Ct. Ariz. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution.

APRIL 14, 1993

Certiorari Denied

No. 92–8307 (A–784). CLARK *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution. Reported below: 1 F. 3d 814.

APRIL 16, 1993

Dismissal Under Rule 46

No. 119, Orig. CONNECTICUT ET AL. *v.* NEW HAMPSHIRE. Bill of complaint dismissed under this Court's Rule 46.1.

APRIL 19, 1993

Certiorari Granted—Vacated and Remanded

No. 92–418. ARAVE, WARDEN *v.* PARADIS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis*

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*[REPORTER'S NOTE: Argued February 23, 1993. *Ann E. Webb* argued the cause for petitioner. With her on the brief was *Theodore G. Dimitry*. *Lynne Liberato* argued the cause for respondents. With her on the brief was *Mark C. Hill*.]

granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arave* v. *Creech, ante,* p. 463. Reported below: 954 F. 2d 1483.

No. 92–464. ARAVE, WARDEN *v.* BEAM. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arave* v. *Creech, ante,* p. 463. Reported below: 966 F. 2d 1563.

No. 92–1089. CITY OF SEATTLE ET AL. *v.* BASCOMB ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.,* 506 U. S. 139 (1993).

Miscellaneous Orders

No. ———. HALL *v.* INTERNAL REVENUE SERVICE; and

No. ———. MCQUEEN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A–750. NIZNIK *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF ROCHESTER. Application for stay of foreclosure and foreclosure sale, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1222. IN RE DISBARMENT OF BAKER. Disbarment entered. [For earlier order herein, see 506 U. S. 1045.]

No. D–1231. IN RE DISBARMENT OF GROSS. Disbarment entered. [For earlier order herein, see *ante,* p. 903.]

No. D–1234. IN RE DISBARMENT OF RICE. Disbarment entered. [For earlier order herein, see *ante,* p. 903.]

No. D–1235. IN RE DISBARMENT OF USHIJIMA. Disbarment entered. [For earlier order herein, see *ante,* p. 903.]

No. D–1256. IN RE DISBARMENT OF LOPEZ. It is ordered that Peter M. Lopez, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1257. IN RE DISBARMENT OF GATES. It is ordered that Larry Edward Gates, Jr., of Myrtle Beach, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92-1214. MILLIGAN-JENSEN *v.* MICHIGAN TECHNOLOGICAL UNIVERSITY. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92-7821. REICHELT *v.* GATES ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 10, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

No. 92-8115. IN RE HEFFERNAN; and
No. 92-8135. IN RE FORTE. Petitions for writs of habeas corpus denied.

No. 92-7644. IN RE TODD;
No. 92-7741. IN RE SCHIFF; and
No. 92-7933. IN RE BAUER. Petitions for writs of mandamus denied.

No. 92-7691. IN RE HOLLINGSWORTH. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 91-1950. AMERICAN DREDGING CO. *v.* MILLER. Sup. Ct. La. Certiorari granted. Reported below: 595 So. 2d 615.

No. 92-989. TENNESSEE *v.* MIDDLEBROOKS; and TENNESSEE *v.* EVANS. Sup. Ct. Tenn. Motion of respondent Donald Middlebrooks for leave to proceed *in forma pauperis* granted. Certiorari as to Donald Middlebrooks granted. Reported below: 840 S. W. 2d 317 (first case).

No. 92-6281. HAGEN *v.* UTAH. Sup. Ct. Utah. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 858 P. 2d 925.

Certiorari Denied

No. 91–7348. Creech *v.* Arave, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 947 F. 2d 873.

No. 92–919. Eisen *v.* United States;
No. 92–968. Morganti et al. *v.* United States;
No. 92–969. Napoli *v.* United States;
No. 92–1222. Fishman *v.* United States; and
No. 92–7394. Weinstein *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 974 F. 2d 246.

No. 92–1003. Dennler et al. *v.* Trippet et al.;
No. 92–1099. Cross, Executrix, et al. *v.* Thorner et al.; and
No. 92–1294. Thorner et al. *v.* Cross, Executrix, et al. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 1533 and 1549.

No. 92–1094. Blake *v.* Cisneros, Secretary of Housing and Urban Development. C. A. Fed. Cir. Certiorari denied. Reported below: 979 F. 2d 215.

No. 92–1114. Johnson *v.* United States Railroad Retirement Board. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 82, 969 F. 2d 1082.

No. 92–1143. Stone et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 909.

No. 92–1169. Eastern Co. et al. *v.* Rinard et al. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 265.

No. 92–1203. Metro Denver Maintenance Cleaning, Inc. *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 968 F. 2d 1049.

No. 92–1209. Bareford et al. *v.* General Dynamics Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 1138.

No. 92–1212. No Name Video, Ltd., et al. *v.* United States et al. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1257.

No. 92–1227. Powelson et al. *v.* United States et al. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 141.

No. 92–1229. LAW ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 977.

No. 92–1234. KAHHAT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 591.

No. 92–1237. HULL, A MINOR, BY HIS NATURAL PARENTS, GUARDIANS, AND PERSONAL REPRESENTATIVES, HULL ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 971 F. 2d 1499.

No. 92–1265. SCHWAGER ET UX. *v.* TEXAS COMMERCE BANK, N. A., ET AL. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 827 S. W. 2d 504.

No. 92–1277. NAGANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 243.

No. 92–1289. OTERO LABORDE *v.* INTERNATIONAL GENERAL ELECTRIC CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 966 F. 2d 1440.

No. 92–1303. LAKELAND LOUNGE OF JACKSON, INC. *v.* CITY OF JACKSON, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 1255.

No. 92–1334. WYNNE *v.* TUFTS UNIVERSITY SCHOOL OF MEDICINE. C. A. 1st Cir. Certiorari denied. Reported below: 976 F. 2d 791.

No. 92–1354. DEUTSCH *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 7th Cir. Certiorari denied. Reported below: 983 F. 2d 741.

No. 92–1358. WILLIS ET AL. *v.* CELOTEX CORP. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 146.

No. 92–1363. PENNSYLVANIA *v.* CLARK. Super. Ct. Pa. Certiorari denied. Reported below: 412 Pa. Super. 92, 602 A. 2d 1323.

No. 92–1365. DAVIS ET AL. *v.* GATES, FORMER CHIEF OF POLICE OF THE CITY OF LOS ANGELES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–1367. NEW CASTLE COUNTY, DELAWARE *v.* HARTFORD ACCIDENT & INDEMNITY CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 970 F. 2d 1267.

No. 92–1378. National States Insurance Co. *v.* Nassen. Sup. Ct. Iowa. Certiorari denied. Reported below: 494 N. W. 2d 231.

No. 92–1379. Michigan Road Builders Assn., Inc., et al. *v.* Director, Michigan Department of Transportation, et al. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 851.

No. 92–1381. Bernklau *v.* Brown, Secretary of Veterans Affairs, et al. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 742.

No. 92–1383. Bogue *v.* Ampex Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 1319.

No. 92–1386. Younger *v.* Younger. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 599.

No. 92–1388. Sullivan *v.* Oklahoma Tax Commission. Ct. App. Okla. Certiorari denied. Reported below: 841 P. 2d 619.

No. 92–1389. Robnett *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–1393. Shah *v.* County of Los Angeles et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–1396. Morris Industrial Builders, Inc. *v.* Township of South Brunswick et al. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 257 N. J. Super. 94, 607 A. 2d 1359.

No. 92–1397. Newsom et al. *v.* Washington, Personal Representative of Estate of Ellington. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 991.

No. 92–1399. Ernster et al. *v.* Ralston Purina Co. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 743.

No. 92–1401. Hawaii *v.* Quino. Sup. Ct. Haw. Certiorari denied. Reported below: 74 Haw. 161, 840 P. 2d 358.

No. 92–1407. Howard *v.* Wolff Broadcasting Co. Sup. Ct. Ala. Certiorari denied. Reported below: 611 So. 2d 307.

No. 92–1410. BRESS, EXECUTIVE DIRECTOR, NEW YORK GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS, ET AL. *v.* CONDELL. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 415.

No. 92–1413. WALGREEN CO. ET AL. *v.* OINESS ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 742.

No. 92–1414. TJOSSEM ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 712.

No. 92–1418. SANDPIPER MOBILE VILLAGE *v.* CITY OF CARPINTERIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 10 Cal. App. 4th 542, 12 Cal. Rptr. 2d 623.

No. 92–1419. RETSOS *v.* VICTOR. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 229 Ill. App. 3d 1112, 648 N. E. 2d 637.

No. 92–1420. LINDER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–1422. MEEKER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–1423. LASITER *v.* GROW ET AL. Ct. App. Ind. Certiorari denied. Reported below: 594 N. E. 2d 536.

No. 92–1426. TATE ET AL. *v.* COLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 591.

No. 92–1431. MATHEWS ET AL. *v.* HARRIS METHODIST, FORT WORTH, TEXAS, ET AL. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 834 S. W. 2d 582.

No. 92–1439. LAYTON *v.* GARRARD COUNTY FISCAL COURT ET AL. Ct. App. Ky. Certiorari denied. Reported below: 840 S. W. 2d 208.

No. 92–1462. SEE YEE KO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 500.

No. 92–1475. I. M. T. C., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1445.

No. 92–1488. PETERSON *v.* STAFFORD, WASHINGTON COUNTY, MINNESOTA, AUDITOR, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 490 N. W. 2d 418.

No. 92–1491. CROUCH ET AL. *v.* BOY SCOUTS OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–1496. OSINOWO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 1048.

No. 92–1535. CANEY *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 956 F. 2d 1172.

No. 92–1569. FERREIRA *v.* SUTHERLAND ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–6629. DEAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 969 F. 2d 187.

No. 92–6639. ALVAREZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–6891. ANALLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 975 F. 2d 119.

No. 92–6944. RESTREPO ET AL. *v.* FIRST NATIONAL BANK OF DONA ANA COUNTY, NEW MEXICO. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 1573.

No. 92–6949. DENMARK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 604 So. 2d 845.

No. 92–6971. KNIGHT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 92–6981. SIMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 964 F. 2d 1082.

No. 92–6987. YARBROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92–7196. BURGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 964 F. 2d 1065.

No. 92–7198. CASTILLO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 80 N. Y. 2d 578, 607 N. E. 2d 1050.

No. 92–7256. PARMALEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 236.

No. 92–7282. BEREGUETE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 845.

No. 92–7301. CONNOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 969 F. 2d 1042.

No. 92–7324. JACKSON, AKA MCELHANNON *v.* UNITED STATES; and

No. 92–7450. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1554.

No. 92–7341. THOMAS-MAHEIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 208.

No. 92–7362. NILSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 967 F. 2d 539.

No. 92–7365. RUMNEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 979 F. 2d 265.

No. 92–7399. GILLIAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 436.

No. 92–7412. ROLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 92–7421. ADAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 596.

No. 92–7425. DUEST *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 967 F. 2d 472.

No. 92–7438. MENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 594.

No. 92–7451. MATTIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 725.

No. 92–7471. WILSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 836 S. W. 2d 872.

No. 92–7481. FAMOR *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 972 F. 2d 1352.

No. 92–7524. JONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 843 S. W. 2d 487.

No. 92–7539. TASCARELLA *v.* UNITED STATES; and
No. 92–7561. TASCARELLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–7570. MORRISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 720.

No. 92–7571. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 213.

No. 92–7573. MARTINEZ *v.* DENVER SHERIFF'S DEPARTMENT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 955 F. 2d 49.

No. 92–7577. KIRKPATRICK *v.* FLORIDA BOARD OF BAR EXAMINERS. Sup. Ct. Fla. Certiorari denied.

No. 92–7601. PETTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 973 F. 2d 1441.

No. 92–7603. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 92–7618. AUSTIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 981 F. 2d 1163.

No. 92–7625. JOHNSON *v.* UNITED STATES;
No. 92–7661. JOHNSON *v.* UNITED STATES; and
No. 92–7666. HOUSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1533.

No. 92–7632. CONYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1259.

No. 92–7639. SMITH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 170 Wis. 2d 701, 490 N. W. 2d 40.

No. 92–7643. TOBISCH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 92-7646. WHITSON *v.* ST. LOUIS CHILDREN'S HOSPITAL. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1264.

No. 92-7648. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 709.

No. 92-7650. OWENS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 309 S. C. 402, 424 S. E. 2d 473.

No. 92-7652. MCINTOSH *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92-7654. RODRIGUEZ MENDOZA *v.* LYNAUGH, FORMER DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92-7655. MCDONALD *v.* MARSHAW ET AL. C. A. 9th Cir. Certiorari denied.

No. 92-7659. GORBEY *v.* FULCOMER, DEPUTY COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 983 F. 2d 1050.

No. 92-7663. CLEMENT *v.* FLORIDA DEPARTMENT OF PROFESSIONAL REGULATION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 606 So. 2d 1168.

No. 92-7664. MUNIYR *v.* AIKEN, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 726.

No. 92-7667. HOWELL *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 254 Mont. 438, 839 P. 2d 87.

No. 92-7669. JENKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 244 Va. 445, 423 S. E. 2d 360.

No. 92-7672. PAYNE *v.* NAGLE, ATTORNEY GENERAL OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 92-7674. VICKSON *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 611 So. 2d 536.

No. 92–7678. POWER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 605 So. 2d 856.

No. 92–7686. NEGRETE *v.* CALIFORNIA (two cases). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–7687. HALL *v.* SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–7688. JONES *v.* HAMILTON ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–7690. JOHNSON *v.* WOLFF ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 589.

No. 92–7693. HARPER *v.* BURTON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 92–7696. SOLLARS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 979 F. 2d 1294.

No. 92–7697. SALAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 208.

No. 92–7700. SIMMONS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 609 So. 2d 36.

No. 92–7701. HOOPER *v.* DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 92–7710. EMERSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 153 Ill. 2d 100, 606 N. E. 2d 1123.

No. 92–7713. WILSON *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 857.

No. 92–7714. TOMS *v.* OHIO UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Ct. App. Ohio, Clark County. Certiorari denied.

No. 92–7715. TURNER *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 828 S. W. 2d 173.

No. 92–7717. MCPETERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 1148, 832 P. 2d 146.

No. 92–7724. FERDIK *v.* SPECIAL PROGRAMS UNIT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1342.

No. 92–7725. GAINES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 332 N. C. 461, 421 S. E. 2d 569.

No. 92–7742. BROWN-EL *v.* ALLEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 353.

No. 92–7749. GATES *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–7756. RICHMOND *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7759. BIRKHOLZ *v.* MONTANA ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 256 Mont. 423, 849 P. 2d 218.

No. 92–7760. PHELPS *v.* LOCKHEED MISSILES & SPACE CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 590.

No. 92–7764. MYER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–7765. MEJIA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–7778. BIDDY *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–7779. MCDONALD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92–7780. PEABODY *v.* CITY OF PHOENIX ET AL. Ct. App. Ariz. Certiorari denied.

No. 92–7781. TURNER *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 738.

No. 92–7783. WHITE *v.* BATH. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 825 S. W. 2d 227.

No. 92–7784. EPPS *v.* GORMAN ET AL. Ct. App. Ohio, Richland County. Certiorari denied.

No. 92–7785. IRBY *v.* MACHT ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–7787. ROMAN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 224 Conn. 63, 616 A. 2d 266.

No. 92–7792. SHOWN *v.* KAISER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 529.

No. 92–7795. MAGEE *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–7798. MESA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–7800. POTTS *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 594 N. E. 2d 438.

No. 92–7803. VARELA *v.* KAISER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 1357.

No. 92–7805. HUTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92–7808. ENGLISH *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 441 Mich. 920, 497 N. W. 2d 184.

No. 92–7812. JENKINS *v.* KOCH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 978 F. 2d 707.

No. 92–7814. CANALES *v.* KAISER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–7816. CARROLL *v.* GOMEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 854.

No. 92–7817. MALIK *v.* HYDE, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 92–7818. MENDEZ *v.* FEDERAL CORRECTIONAL INSTITUTION, BUTNER, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1251.

No. 92–7819. PIEARSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92–7822. ROBERTSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 747.

No. 92–7827. BARTO *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 92–7829. ARNETTE *v.* MADISON CABLEVISION, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 571.

No. 92–7830. DEFOE *v.* ERICKSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 92–7838. BRODIN ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 92–7842. MCILROY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 970 F. 2d 692.

No. 92–7855. SMITH *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 152 Ill. 2d 229, 604 N. E. 2d 858.

No. 92–7864. GOLDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 578.

No. 92–7872. TINKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 241.

No. 92–7875. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1444.

No. 92–7890. PEREZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1260.

No. 92–7906. MALIK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 1249.

No. 92–7908. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1344.

No. 92–7924. D'IGUILLONT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 612.

No. 92–7929. Chen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1259.

No. 92–7934. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1262.

No. 92–7936. Fossey *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 986 F. 2d 1423.

No. 92–7940. Escamilla *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 981 F. 2d 867.

No. 92–7941. Hawkins *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92–7945. Cale *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 1422.

No. 92–7949. Tucker *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1059.

No. 92–7951. Aslakson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 283.

No. 92–7960. Kowalczyk *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 174.

No. 92–7968. Realpe *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 1250.

No. 92–7969. Perez-Payan *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 530.

No. 92–7975. Deese *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–7980. Borschell *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1065.

No. 92–7990. Smith *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–7991. Talamante *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 981 F. 2d 1153.

No. 92–7995. Chambers *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 574.

No. 92-7997. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92-7998. LOGAN *v.* GRAMLEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1261.

No. 92-7999. RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 209.

No. 92-8004. ELKSHOULDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1078.

No. 92-8007. SCOTT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 975 F. 2d 927.

No. 92-8011. BONDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92-8013. COUSART *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 618 A. 2d 96.

No. 92-8015. HIKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 526.

No. 92-8016. BRUCE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 617 A. 2d 986.

No. 92-8017. ETHRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1260.

No. 92-8084. HAWKINS *v.* MCKENNA ET AL. C. A. 6th Cir. Certiorari denied.

No. 92-1149. MURDOCK ET AL. *v.* UTE DISTRIBUTION CORP. ET AL. C. A. 10th Cir. Motion of Ute Indian Tribe for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 975 F. 2d 683.

No. 92-1382. MEDALLION OIL CO. ET AL. *v.* TRANSAMERICAN NATURAL GAS CORP. ET AL. C. A. 5th Cir. Motions of Independent Bankers Association of Texas and Texas Independent Producers and Royalty Owners Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 972 F. 2d 96.

No. 92-1400. QUAKER OATS CO. *v.* SANDS, TAYLOR & WOOD CO. C. A. 7th Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 978 F. 2d 947.

No. 92–1405. SASSOWER ET AL. *v.* FIELD ET AL. C. A. 2d Cir. Motion of petitioners to have the petition for writ of certiorari considered with the petition in No. 92–1544, *Pacific Legal Foundation* v. *Kayfetz et al.*, denied. Certiorari denied. Reported below: 973 F. 2d 75.

No. 92–1412. JOHNSON *v.* BURTON. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 975 F. 2d 690.

No. 92–1425. DORDIES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 232 Ill. App. 3d 1105, 650 N. E. 2d 22.

No. 92–7507. MUELLER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 244 Va. 386, 422 S. E. 2d 380.

JUSTICE WHITE, with whom JUSTICE BLACKMUN and JUSTICE SOUTER join, dissenting.

Under *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981), a defendant who invokes the Fifth Amendment right to counsel during custodial interrogation may not be subjected to further interrogation until counsel is made available to him, unless he subsequently initiates communications. "[I]t is inconsistent with *Miranda* [v. *Arizona*, 384 U. S. 436 (1966),] and its progeny," the Court concluded, "for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.*, at 485. While easily stated, the *Edwards* rule has not always been easy to apply. In particular, the question of how officials conducting an interrogation ought to respond to a defendant's ambiguous or equivocal assertion of the right to counsel has divided the state and federal courts. The Court should take this opportunity to resolve this important constitutional question.

Virginia police arrested petitioner in connection with the abduction, rape, and murder of 10-year-old Charity Powers. Petitioner was advised of his *Miranda* rights and agreed to talk to a detective and an FBI agent. During the interrogation, petitioner asked the detective: "'Do you think I need an attorney here?'"

The detective responded by shaking his head slightly from side to side, shrugging, and stating: "'You're just talking to us.'" The interrogation continued and petitioner confessed to the crimes. See 244 Va. 386, 391, 422 S. E. 2d 380, 384 (1992). Petitioner sought to suppress the confession, claiming, *inter alia,* that the continuation of the interrogation constituted an *Edwards* violation. The trial court denied the motion and petitioner was tried, convicted, and sentenced to death. Relying on its prior decision in *Eaton* v. *Commonwealth,* 240 Va. 236, 253–254, 397 S. E. 2d 385, 395–396 (1990), cert. denied, 502 U. S. 824 (1991), which in turn relied on *Edwards'* reference to a defendant who has "clearly asserted" the right to counsel, see *supra,* at 1043, the Virginia Supreme Court affirmed, concluding that petitioner's question "did not constitute an unambiguous request for counsel" and therefore was insufficient to trigger *Edwards.* 244 Va., at 396, 422 S. E. 2d, at 387. Petitioner now seeks review of this ruling, among others. Pet. for Cert. 11–12.

It has been nearly a decade since the Court acknowledged the existence of three "conflicting standards" used by state and federal courts for determining the consequences of ambiguous or equivocal assertions of the right to counsel. *Smith* v. *Illinois,* 469 U. S. 91, 95–96, and n. 3 (1984) *(per curiam).* Thus,

> "[s]ome courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. . . . Still others have adopted a third approach, holding that when an accused makes an equivocal statement that 'arguably' can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to 'clarify' the earlier statement and the accused's desires respecting counsel." *Id.,* at 96, n. 3 (citations omitted).

This disagreement has not abated. Although a number of Circuits have since adopted what *Smith* described as the "third approach," see *United States* v. *Porter,* 776 F. 2d 370 (CA1 1985); *United States* v. *Gotay,* 844 F. 2d 971, 975 (CA2 1988); *United States* v. *Fouche,* 776 F. 2d 1398, 1405 (CA9 1985); *Towne* v. *Dugger,* 899 F. 2d 1104 (CA11), cert. denied, 498 U. S. 991 (1990), the

Sixth Circuit apparently adheres to the first approach. See *Maglio* v. *Jago*, 580 F. 2d 202, 205 (1978) (ambiguous invocation requires cessation of all questioning). State high courts also continue to issue conflicting decisions. Kentucky and Texas, like Virginia, now employ a variant of the second, "threshold standard," approach, see *Dean* v. *Commonwealth*, 844 S. W. 2d 417, 420 (Ky. 1992) (endorsing *Eaton* v. *Commonwealth*, *supra*); *Russell* v. *State*, 727 S. W. 2d 573, 575 (Tex. Crim. App.) (en banc) (right to counsel invoked if "clearly asserted"), cert. denied, 484 U. S. 856 (1987), while other States and the District of Columbia have embraced the third approach, see *State* v. *Staatz*, 159 Ariz. 411, 414, 768 P. 2d 143, 146 (1988); *People* v. *Benjamin*, 732 P. 2d 1167, 1171 (Colo. 1987), *Crawford* v. *State*, 580 A. 2d 571, 576–577 (Del. 1990); *Ruffin* v. *United States*, 524 A. 2d 685 (D. C. 1987), cert. denied, 486 U. S. 1057 (1988); *Hall* v. *State*, 255 Ga. 267, 273, 336 S. E. 2d 812, 816 (1985); *State* v. *Robinson*, 427 N. W. 2d 217, 223 (Minn. 1988).

As it is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received, and will continue to receive, dissimilar treatment because of the different approaches taken by the lower courts, I would grant certiorari.

No. 92–7774. ECHOLS *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 92–912. PRIMROSE OIL CO., INC. *v.* STEVEN D. THOMPSON TRUCKING, INC., ET AL., *ante*, p. 911;

No. 92–943. CAMPO *v.* ELECTRO-COAL TRANSFER CORP., INC., *ante*, p. 912;

No. 92–992. LEWIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEWIS, DECEASED, ET AL. *v.* UNITED STATES NAVY, *ante*, p. 914;

No. 92–993. MCCUE *v.* MCCUE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MCCUE, DECEASED, *ante*, p. 914;

No. 92–1029. SKURNICK *v.* AINSWORTH, *ante*, p. 915;

No. 92–1037. MILLER *v.* INDIANA HOSPITAL ET AL., *ante*, p. 952;

No. 92–1117. HALL *v.* CONWAY ET AL., *ante*, p. 918;

No. 92–1118. CAMOSCIO *v.* CONWAY ET AL., *ante*, p. 918;

No. 92–1167. BUSH *v.* ZEELAND PUBLIC SCHOOLS ET AL., *ante*, p. 920;

No. 92–1174. SCHNEIDERMAN ET AL. *v.* UNITED STATES, *ante*, p. 921;

No. 92–5743. DAWSON *v.* NEVADA, *ante*, p. 921;

No. 92–6331. DAVIS *v.* BENTSEN, SECRETARY OF THE TREASURY, ET AL., *ante*, p. 923;

No. 92–6448. GILES *v.* HOTEL OAKLAND ASSOCIATES ET AL., *ante*, p. 923;

No. 92–6459. SELLAND *v.* UNITED STATES ET AL., *ante*, p. 923;

No. 92–6530. GRIFFIN *v.* ILLINOIS, *ante*, p. 924;

No. 92–6546. CALDWELL *v.* SECRETARY OF VETERANS AFFAIRS ET AL., *ante*, p. 1001;

No. 92–6584. ALLEN *v.* NORTH CAROLINA, *ante*, p. 967;

No. 92–6594. HILL *v.* NORTH CAROLINA, *ante*, p. 924;

No. 92–6664. THAKKAR *v.* DEBEVOISE, *ante*, p. 974;

No. 92–6669. MARTINEZ *v.* UNITED STATES, *ante*, p. 925;

No. 92–6773. LEWIS *v.* AMERICAN AIRLINES ET AL., *ante*, p. 927;

No. 92–6782. MOORE *v.* UNITED STATES, *ante*, p. 927;

No. 92–6791. ELLIS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante*, p. 927;

No. 92–6842. STEVENS *v.* ZANT, WARDEN, *ante*, p. 929;

No. 92–6865. PEABODY *v.* ARIZONA, *ante*, p. 930;

No. 92–6883. MINNIS *v.* BALDWIN, *ante*, p. 930;

No. 92–6904. HOLMAN *v.* ASPIN, SECRETARY OF DEFENSE, ET AL., *ante*, p. 989;

No. 92–6918. SEAGRAVE *v.* GOMEZ, WARDEN, *ante*, p. 931;

No. 92–6920. SEAGRAVE *v.* CALIFORNIA, *ante*, p. 932;

No. 92–6954. SATCHER *v.* VIRGINIA, *ante*, p. 933;

No. 92–6967. PRENZLER *v.* KLEINMAN, *ante*, p. 934;

No. 92–6972. GOODMAN *v.* GOODMAN, *ante*, p. 934;

No. 92–6985. ALLEN *v.* LEIMBACH, *ante*, p. 935;

No. 92–7089. MCCULLOUGH *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 975;

No. 92–7090. YOUNG *v.* UNITED STATES, *ante*, p. 940;

No. 92–7100. RAMAGE ET AL. *v.* CLINTON STATE BANK, *ante*, p. 941;

No. 92–7134. SMITH *v.* HAITH ET AL., *ante*, p. 963;

No. 92–7149. EMBABY *v.* CONTROL DATA CORP., *ante*, p. 963;

No. 92–7158. MERCER *v.* UNITED STATES, *ante*, p. 952;

No. 92–7195. POWELL *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 964;

No. 92–7234. FERDIK *v.* CORBETT ET AL., *ante*, p. 976;

No. 92–7248. HARDING *v.* MARYLAND, *ante*, p. 945;

No. 92–7265. SCOTT *v.* INDETERMINATE SENTENCE REVIEW BOARD FOR WASHINGTON, *ante*, p. 946;

No. 92–7321. JOHNSON *v.* DEPARTMENT OF DEFENSE, *ante*, p. 977;

No. 92–7402. KOWEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., *ante*, p. 978;

No. 92–7415. MCGANN *v.* BIDERMAN ET AL., *ante*, p. 978; and

No. 92–7493. MARENO *v.* JET AVIATION OF AMERICA, INC., *ante*, p. 966. Petitions for rehearing denied.

No. 92–895. ROUCH *v.* ENQUIRER & NEWS OF BATTLE CREEK, MICHIGAN, *ante*, p. 967; and

No. 92–954. KING, AKA GREENE *v.* RUSSELL ET AL., *ante*, p. 913. Motions of petitioners for leave to proceed further herein *in forma pauperis* granted. Petitions for rehearing denied.

No. 92–5554. MOSS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 506 U. S. 1055. Motion for leave to file petition for rehearing denied.

APRIL 20, 1993

Certiorari Denied

No. 92–8383 (A–801). HENDERSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 617 So. 2d 313.

APRIL 21, 1993

Certiorari Denied

No. 92–8394 (A–806). HENDERSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

April 22, 1993

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post,* p. 1061; amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1077; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1091; amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1163; and amendments to the Federal Rules of Evidence, see *post,* p. 1189.)

April 23, 1993

Dismissal Under Rule 46

No. 92–1464. TransAmerican Natural Gas Corp., fka GHR Energy Corp. *v.* Toma Steel Supply, Inc. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 978 F. 2d 1409.

April 26, 1993

Certiorari Granted—Vacated and Remanded

No. 91–1977. Hatfield *v.* Burlington Northern Railroad Co. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *CSX Transp., Inc.* v. *Easterwood, ante,* p. 658. Reported below: 958 F. 2d 320.

No. 92–926. Singletary, Secretary, Florida Department of Corrections *v.* Smith. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Brecht* v. *Abrahamson, ante,* p. 619. Justice Blackmun, Justice Stevens, and Justice O'Connor dissent. Reported below: 970 F. 2d 766.

No. 92–966. Polsby *v.* Shalala, Secretary of Health and Human Services, et al. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Acting Solicitor General in his brief for the United States filed March 5, 1993. Reported below: 970 F. 2d 1360.

No. 92–1163. Singletary, Secretary, Florida Department of Corrections *v.* Duest. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Brecht* v. *Abrahamson*, *ante*, p. 619. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR dissent. Reported below: 967 F. 2d 472.

Miscellaneous Orders

No. ———. KALAMA ET UX. *v.* KELLEY ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–738. DE FALCO *v.* METRO DADE COUNTY ET AL. Application for stay of elections, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–774 (92–1570). FARMERS INSURANCE GROUP, DBA TRUCK INSURANCE EXCHANGE ET AL. *v.* MASSEY ET AL. C. A. 10th Cir. Application for stay of execution and enforcement of judgment pending disposition of the petition for writ of certiorari, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. 105, Orig. KANSAS *v.* COLORADO. Motion of the Special Master for award of interim fees and reimbursement of expenses for the period June 22, 1992, through February 28, 1993, granted, and the Special Master is awarded a total of $153,042.26 to be paid as follows: 40% by Kansas, 40% by Colorado, and 20% by the United States. [For earlier order herein, see, *e. g.*, 506 U. S. 805.]

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. State of Nebraska's Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims denied without prejudice with respect to Count I. The Special Master is directed to provide a recommendation to the Court as to whether the motion for leave to file an amended petition should be granted with respect to Counts II and III. [For earlier decision herein, see, *e. g.*, *ante*, p. 584.]

No. 92–1398. RICHARDSON, CHAPTER 7 PANEL TRUSTEE *v.* MT. ADAMS FURNITURE. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–5653. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. [Certiorari granted, 506 U. S. 1090.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 92–7962. HUNT ET UX. *v.* ROBINSON, COMMISSIONER OF SOCIAL SERVICES OF MASSACHUSETTS. App. Ct. Mass. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 17, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BLACKMUN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.,* 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis.*

No. 92–7858. IN RE SWEET ET AL. Petition for writ of mandamus denied.

Certiorari Granted

No. 92–1196. RATZLAF ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. Reported below: 976 F. 2d 1280.

Certiorari Denied

No. 91–1423. RAILROAD COMMISSION OF TEXAS ET AL. *v.* MISSOURI PACIFIC RAILROAD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 948 F. 2d 179.

No. 91–2004. CITY OF FENTON *v.* GRAND TRUNK WESTERN RAILROAD CO. Sup. Ct. Mich. Certiorari denied. Reported below: 439 Mich. 240, 482 N. W. 2d 706.

No. 92–601. COTTLE *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 92–1245. ANAGNOSTOU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 974 F. 2d 939.

No. 92–1271. ESQUIVEL-BERRIOS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 971 F. 2d 26.

No. 92–1287. Taylor et al. *v.* Florida Atlantic University et al. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 743.

No. 92–1307. Selaiden Builders, Inc., et al. *v.* Federal Deposit Insurance Corporation, as Receiver of Vernon Savings & Loan Assn., F. S. A. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 1249.

No. 92–1315. Shaner et al. *v.* United States et al. C. A. 6th Cir. Certiorari denied. Reported below: 976 F. 2d 990.

No. 92–1430. Davidson et al. *v.* Velsicol Chemical Corp. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 591, 834 P. 2d 931.

No. 92–1435. Estate of Ospina, by His Executor, Coughlin, et al. *v.* Trans World Airlines, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 975 F. 2d 35.

No. 92–1438. Haviland *v.* J. Aron & Co. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 499.

No. 92–1440. Neal *v.* Brown et al. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 370, 980 F. 2d 747.

No. 92–1443. Wright et al. *v.* DeArmond, State's Attorney for Vermilion County, Illinois, et al. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 339.

No. 92–1444. Bates et al. *v.* Withrow, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1065.

No. 92–1445. Lummi Indian Tribe *v.* Washington. C. A. 9th Cir. Certiorari denied. Reported below: 969 F. 2d 752.

No. 92–1446. Texas *v.* Rios. Ct. Crim. App. Tex. Certiorari denied. Reported below: 846 S. W. 2d 310.

No. 92–1451. Travellers International AG. *v.* Trans World Airlines, Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 982 F. 2d 96.

No. 92–1457. Larry et al. *v.* White et al. C. A. 5th Cir. Certiorari denied. Reported below: 929 F. 2d 206.

No. 92–1459. MICHIGAN *v.* DOMAIAR. Ct. App. Mich. Certiorari denied.

No. 92–1477. MISSOURI PACIFIC RAILROAD CO. *v.* CONANT. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 92–1497. LEA *v.* INDEPENDENT FIRE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 377.

No. 92–1515. ALBERICI ET UX. *v.* UNITED STATES ET AL.; and ALBERICI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 980 F. 2d 722 (first case); 981 F. 2d 1248 (second case).

No. 92–1525. MOORE ET AL. *v.* METROPOLITAN WASTE CONTROL COMMISSION ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–1539. HASENSTAB *v.* MCGUIRE, POLICE COMMISSIONER OF NEW YORK, NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 80 N. Y. 2d 812, 600 N. E. 2d 620.

No. 92–1562. BROWNING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1259.

No. 92–7176. CASTELLON *v.* HATCHER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 736.

No. 92–7454. MOODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 1425.

No. 92–7478. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 208.

No. 92–7532. SURASKY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 19.

No. 92–7557. HYDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 1436.

No. 92–7560. CLARK *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 35 M. J. 432.

No. 92–7670. HURST *v.* TOWN OF SHELBURN, INDIANA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 581.

No. 92–7766. SHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1063.

No. 92–7797. Otero *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–7813. Nguyen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 980 F. 2d 727.

No. 92–7823. Malik *v.* Wilhelm, Deputy Superintendent/Security, Sullivan Correctional Facility, et al. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 499.

No. 92–7824. Campbell *v.* Medel et al. C. A. 8th Cir. Certiorari denied.

No. 92–7826. Hicks *v.* Senkowski, Superintendent, Clinton Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 622.

No. 92–7839. Domby *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1341.

No. 92–7843. Birkholz *v.* Schott et al. Sup. Ct. Mont. Certiorari denied.

No. 92–7844. Woodward *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 4 Cal. 4th 376, 841 P. 2d 954.

No. 92–7852. Ferdik *v.* McFadden, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 854.

No. 92–7854. Herrera *v.* Cody, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1267.

No. 92–7861. Goble *v.* Ohio. Ct. App. Ohio, Richland County. Certiorari denied.

No. 92–7862. Hawthorne *v.* Vasquez, Warden. Sup. Ct. Cal. Certiorari denied.

No. 92–7871. Caicedo *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 92–7873. Stewart *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 199.

No. 92–7876. Hoopaugh *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 237.

No. 92–7880. Beasley *v.* Farcas, Superintendent, Martin Correctional Institution. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1349.

No. 92–7882. Cosby *v.* Stone et al. C. A. 10th Cir. Certiorari denied. Reported below: 977 F. 2d 596.

No. 92–7883. Saleem *v.* Forrester. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 693, 424 S. E. 2d 623.

No. 92–7884. Doe et al. *v.* Schillinger et al. C. A. 7th Cir. Certiorari denied.

No. 92–7887. Springs *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1080.

No. 92–7893. Beaumont et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 553.

No. 92–7895. Molina *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 845.

No. 92–7896. Marshall *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 221 Ill. App. 3d 1118, 638 N. E. 2d 1222.

No. 92–7898. Clayton *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 237.

No. 92–7899. Bastar *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 982 F. 2d 64.

No. 92–7902. Longstreth *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7907. Quintero *v.* Russell, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 980 F. 2d 731.

No. 92–7910. Mosby *v.* Steen, Clerk, Supreme Court of Arkansas. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 735.

No. 92–7911. McGuire *v.* Gordon et al. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 526.

No. 92–7917. Conboy *v.* Credit Bureau, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1250.

No. 92–7925. THREADGILL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–7950. SCARBOROUGH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 423 Pa. Super. 639, 616 A. 2d 719.

No. 92–7956. FRANCIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–7959. HOOD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 332 N. C. 611, 422 S. E. 2d 679.

No. 92–7964. GRANT *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 711.

No. 92–7965. GRANT *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–7973. LEWIS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–7986. GOFF *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1342.

No. 92–8018. HALL *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 596, 422 S. E. 2d 533.

No. 92–8021. TRUSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1263.

No. 92–8026. WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 554.

No. 92–8030. NJOKU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 622.

No. 92–8031. PETERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 500.

No. 92–8035. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 979 F. 2d 849.

No. 92–8036. PHILLIPS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 983 F. 2d 1073.

No. 92–8037. COCHRAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 525.

No. 92–8040. WEIMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 986 F. 2d 1419.

No. 92–8042. ARNOLD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1121.

No. 92–8046. FARMER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 616 A. 2d 1241.

No. 92–8047. DUFF-SMITH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 1175.

No. 92–8048. STEVENS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 728.

No. 92–8050. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 222.

No. 92–8051. TRAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 1131.

No. 92–8053. ARAUJO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 983 F. 2d 968.

No. 92–8057. STAGNER *v.* PATENT AND TRADEMARK OFFICE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 743.

No. 92–8059. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1262.

No. 92–8071. NNANI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–8072. ORTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1346.

No. 92–8074. PARDO-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1078.

No. 92–8075. LOERA-TELLEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1078.

No. 92–8077. MOSES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–8078. MAYHEW *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 983 F. 2d 1087.

No. 92–8082. HASAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 150.

No. 92–8090. PERDOMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 846.

No. 92–8094. ANDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1065.

No. 92–8161. OMASTA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 235.

No. 92–1150. CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 298 U. S. App. D. C. 54, 976 F. 2d 2.

No. 92–1258. MICHIGAN *v.* NANCE. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 92–8041 (A–733). STEARMAN *v.* UNITED STATES. C. A. 5th Cir. Application for stay of mandate and other relief, addressed to JUSTICE THOMAS and referred to the Court, denied. Certiorari denied. Reported below: 981 F. 2d 1256.

Rehearing Denied

No. 92–409. DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* LASHLEY, *ante*, p. 272;

No. 92–924. GARTHRIGHT, EXECUTOR *v.* ESTATE OF LOCKE, DECEASED, *ante*, p. 912;

No. 92–6824. SMITH *v.* KLINCAR, WARDEN, ET AL., *ante*, p. 928;

No. 92–6862. Green et al. *v.* Chatham County, Georgia, *ante*, p. 929;

No. 92–6936. Livaditis *v.* California, *ante*, p. 975;

No. 92–6947. England *v.* Commissioner of Internal Revenue et al., *ante*, p. 933;

No. 92–7160. Randle *v.* Runyon, Postmaster General, *ante*, p. 943;

No. 92–7251. Assa'ad-Faltas *v.* Virginia Department of Health et al., *ante*, p. 967;

No. 92–7260. Martin *v.* Florida, *ante*, p. 976;

No. 92–7313. Dansby *v.* United States et al., *ante*, p. 977;

No. 92–7352. Van Der Jagt *v.* United States Congress, *ante*, p. 1001;

No. 92–7476. Liggins *v.* Armontrout, Assistant Director, Missouri Division of Adult Institutions, *ante*, p. 995;

No. 92–7510. Carter *v.* Department of Justice et al., *ante*, p. 996;

No. 92–7538. Omoike *v.* GSX Land Treatment Co., *ante*, p. 1009; and

No. 92–7576. Johnson *v.* Injured Workers Insurance Fund, *ante*, p. 980. Petitions for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 22, 1993, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1060. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, and 500 U. S. 1007.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 22, 1993

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 3, 3.1, 4, 5.1, 6, 10, 12, 15, 25, 28, and 34, and to Forms 1, 2, and 3.

[See *infra*, pp. 1063–1074.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1993, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of right—how taken.

* * * * *

(*c*) *Content of the notice of appeal.*—A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(*d*) *Serving the notice of appeal.*—The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record (apart from the appellant's), or, if a party is not represented by counsel, to the party's last known address. The clerk of the district court shall forthwith send a copy of the notice and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. The clerk's failure to serve notice does not affect the validity of the appeal. Service is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

. . . . .

Rule 3.1. Appeal from a judgment entered by a magistrate judge in a civil case.

When the parties consent to a trial before a magistrate judge under 28 U. S. C. § 636(c)(1), any appeal from the judgment must be heard by the court of appeals in accordance with 28 U. S. C. § 636(c)(3), unless the parties consent to an appeal on the record to a district judge and thereafter, by petition only, to the court of appeals, in accordance with 28 U. S. C. § 636(c)(4). An appeal under 28 U. S. C. § 636(c)(3) must be taken in identical fashion as an appeal from any other judgment of the district court.

Rule 4. Appeal as of right—when taken.

(*a*) *Appeal in a civil case.*

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency

thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date when the clerk received the notice and send it to the clerk of the district court and the notice will be treated as filed in the district court on the date so noted.

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

* * * * *

(*b*) *Appeal in a criminal case.*—In a criminal case, a defendant shall file the notice of appeal in the district court within 10 days after the entry either of the judgment or order appealed from, or of a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence, or order—but before entry of the judgment or order—is treated as filed on the date of and after the entry. If a defendant makes a timely motion specified immediately below, in accordance with the Federal Rules of Criminal Procedure, an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. This provision applies to a timely motion:

(1) for judgment of acquittal;

(2) for arrest of judgment;

(3) for a new trial on any ground other than newly discovered evidence; or

(4) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment.

A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal must be filed in the district court within 30 days after (i) the entry of the judgment or order appealed from or (ii) the filing of a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered on the criminal docket. Upon a showing of excusable neglect, the district court may—before or after the time has expired, with or without motion and notice—extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

(c) *Appeal by an inmate confined in an institution.*—If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U. S. C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. In a civil case in which the first notice of appeal is filed in the manner provided in this subdivision (c), the 14-day period provided in paragraph (a)(3) of this Rule 4 for another party to file a notice of appeal runs from the date when the district court receives the first notice of appeal. In a criminal case in which a defendant files a notice of appeal in the manner provided in this subdivision (c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's receipt of the defendant's notice of appeal.

Rule 5.1. Appeal by permission under 28 U. S. C. § 636(c)(5).

(*a*) *Petition for leave to appeal; answer or cross petition.*—An appeal from a district court judgment, entered after an appeal under 28 U. S. C. § 636(c)(4) to a district judge from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. An appeal on petition for leave to appeal is not a matter of right, but its allowance is a matter of sound judicial discretion. The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed. Within 14 days after service of the petition, a party may file an answer in opposition or a cross petition.

* * * * *

Rule 6. Appeal in a bankruptcy case from a final judgment, order, or decree of a district court or of a bankruptcy appellate panel.

* * * * *

(*b*) *Appeal from a judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case.*

* * * * *

(*2*) *Additional rules.*—In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U. S. C. § 158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U. S. C. § 158(a) or (b):

(*i*) *Effect of a motion for rehearing on the time for appeal.*—If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.

* * * * *

Rule 10. The record on appeal.

* * * * *

(*b*) *The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.*

* * * * *

(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of

the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

. . . . .

Rule 12. Docketing the appeal; filing a representation statement; filing the record.

. . . . .

(*b*) *Filing a representation statement.*—Within 10 days after filing a notice of appeal, unless another time is designated by the court of appeals, the attorney who filed the notice of appeal shall file with the clerk of the court of appeals a statement naming each party represented on appeal by that attorney.

(*c*) *Filing the record, partial record, or certificate.*—Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

Rule 15. Review or enforcement of an agency order—how obtained; intervention.

(*a*) *Petition for review of order; joint petition.*—Review of an order of an administrative agency, board, commission, or officer (hereinafter, the term "agency" will include agency, board, commission, or officer) must be obtained by filing with the clerk of a court of appeals that is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" will include a petition to enjoin, set aside, suspend, modify, or otherwise review, or a notice of appeal). The petition must name each party seeking review either in the caption or in the body of the petition. Use of such terms as "et al.," or "petitioners," or "respondents" is not effective to name the parties. The petition also must designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency must be named respondent. The United States will also be a respondent if required by statute, even though not designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

. . . . .

(*e*) *Payment of fees.*—When filing any separate or joint petition for review in a court of appeals, the petitioner must pay the clerk of the court of appeals the fees established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.

Rule 25. Filing and service.

(*a*) *Filing.*—Papers required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U. S. C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.

* * * * *

Rule 28. Briefs.

(*a*) *Appellant's brief.*—The brief of the appellant must contain, under appropriate headings and in the order here indicated:

* * * * *

(*5*) *An argument.*—The argument may be preceded by a summary. The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

* * * * *

(*b*) *Appellee's brief.*—The brief of the appellee must conform to the requirements of paragraphs (a)(1)–(5), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the standard of review.

* * * * *

Rule 34. Oral argument.

* * * * *

(*c*) *Order and content of argument.*—The appellant is entitled to open and conclude the argument. Counsel may not read at length from briefs, records, or authorities.

* * * * *

APPENDIX OF FORMS

FORM 1. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the ________ District of ________
File Number ________________

A. B., Plaintiff
v.
C. D., Defendant
} Notice of Appeal

Notice is hereby given that (here name all parties taking the appeal), (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the ________ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of __________, 19____.

(s) ____________________
Attorney for ________________
Address: ________________

*See Rule 3(c) for permissible ways of identifying appellants.

FORM 2. NOTICE OF APPEAL TO A COURT OF APPEALS FROM A DECISION OF THE UNITED STATES TAX COURT

UNITED STATES TAX COURT
Washington, D. C.

A. B., Petitioner
v.
Commissioner of Internal
Revenue, Respondent
} Docket No. ________

Notice of Appeal

Notice is hereby given that (here name all parties taking the appeal)* hereby appeal to the United States Court of Appeals for the ____________ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the ____ day of __________, 19____ (relating to ____________________________________).

(s) ____________________
Counsel for ________________
Address: ________________

*See Rule 3(c) for permissible ways of identifying appellants.

FORM 3. PETITION FOR REVIEW OF ORDER OF AN AGENCY, BOARD, COMMISSION OR OFFICER

United States Court of Appeals for the ______________________ Circuit

A. B., Petitioner
v.
XYZ Commission,
Respondent
} Petition for Review

(here name all parties bringing the petition)* hereby petition the court for review of the Order of the XYZ Commission (describe the order) entered on ____________, 19____.

(s) ______________________________
Attorney for Petitioners
Address: ______________________________

*See Rule 15.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 22, 1993, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1076. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, and 500 U. S. 1017.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 22, 1993

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court pursuant to Section 2075 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1010, 1013, 1017, 2002, 2003, 2005, 3009, 3015, 3018, 3019, 3020, 5005, 6002, 6006, 6007, 9002, and 9019, and new Rule 9036.

[See *infra*, pp. 1079–1087.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on August 1, 1993, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1010. Service of involuntary petition and summons; petition commencing ancillary case.

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on any other parties as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(f) and Rule 4(g) and (h) F. R. Civ. P. apply when service is made or attempted under this rule.

Rule 1013. Hearing and disposition of a petition in an involuntary case.

(*a*) *Contested petition.*—The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter any other appropriate order.

(*b*) *Default.*—If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief requested in the petition.

(*c*) *[Abrogated]*

Rule 1017. Dismissal or conversion of case; suspension.

. . . . .

(*d*) *Procedure for dismissal or conversion.*—A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§ 706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014. Conversion or dismissal pursuant to §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§ 1208(a) or 1307(a), and the filing date of the notice shall be deemed the date of the conversion order for the purposes of applying § 348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of the notice.

. . . . .

Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.

. . . . .

(*j*) *Notices to the United States.*—Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case, to the Securities and Exchange Commission at any place the Commission designates, if the Commission has filed either a notice of appearance in the case or a written request to receive notices; . . . .

. . . . .

Rule 2003. Meeting of creditors or equity security holders.

(*a*) *Date and place.*—In a chapter 7 liquidation or a chapter 11 reorganization case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 40 days after the order for relief. In a chapter 12 family farmer debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 35 days after the order for relief. In a chapter 13 individual's debt adjustment case, the United States trustee shall call a meeting of creditors to be held no fewer than 20 and no more than 50 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later date for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.

* * * * *

Rule 2005. Apprehension and removal of debtor to compel attendance for examination.

* * * * *

(*b*) *Removal.*—Whenever any order to bring the debtor before the court is issued under this rule and the debtor is found in a district other than that of the court issuing the order, the debtor may be taken into custody under the order and removed in accordance with the following rules:

(1) If the debtor is taken into custody under the order at a place less than 100 miles from the place of issue of the order, the debtor shall be brought forthwith before the court that issued the order.

(2) If the debtor is taken into custody under the order at a place 100 miles or more from the place of issue of the order, the debtor shall be brought without unnecessary delay before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the magistrate judge, bankruptcy judge, or district judge finds that an order has issued under this rule and that the person in custody is the debtor, or if the person in custody waives a hearing, the magistrate judge, bankruptcy judge, or district judge shall order removal, and the person in custody shall be released on conditions ensuring prompt appearance

before the court that issued the order to compel the attendance.

. . . . .

Rule 3009. Declaration and payment of dividends in a Chapter 7 liquidation case.

In a chapter 7 case, dividends to creditors shall be paid as promptly as practicable. Dividend checks shall be made payable to and mailed to each creditor whose claim has been allowed, unless a power of attorney authorizing another entity to receive dividends has been executed and filed in accordance with Rule 9010. In that event, dividend checks shall be made payable to the creditor and to the other entity and shall be mailed to the other entity.

Rule 3015. Filing, objection to confirmation, and modification of a plan in a Chapter 12 family farmer's debt adjustment or a Chapter 13 individual's debt adjustment case.

(*a*) *Chapter 12 plan.*—The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(*b*) *Chapter 13 plan.*—The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 15 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(*c*) *Dating.*—Every proposed plan and any modification thereof shall be dated.

(*d*) *Notice and copies.*—The plan or a summary of the plan shall be included with each notice of the hearing on confirmation mailed pursuant to Rule 2002. If required by the court, the debtor shall furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.

(*e*) *Transmission to United States trustee.*—The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

(*f*) *Objection to confirmation; determination of good faith in the absence of an objection.*—An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(*g*) *Modification of plan after confirmation.*—A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

Rule 3018. Acceptance or rejection of plan in a Chapter 9 municipality or a Chapter 11 reorganization case.

* * * * *

Rule 3019. Modification of accepted plan before confirmation in a Chapter 9 municipality or Chapter 11 reorganization case.

In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Rule 3020. Deposit; confirmation of plan in a Chapter 9 municipality or a Chapter 11 reorganization case.

(*a*) *Deposit.*—In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.

(*b*) *Objection to and hearing on confirmation in a Chapter 9 or Chapter 11 case.*

(1) Objection.—An objection to confirmation of the plan shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code, and any other entity designated by the court, within a time fixed by the court. Unless the case is a chapter 9 municipality case, a copy of every objection to confirmation shall be transmitted by the objecting party to the United States trustee within the time fixed for filing objections. An objection to confirmation is governed by Rule 9014.

(*2*) *Hearing.*—The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(*c*) *Order of confirmation.*—The order of confirmation shall conform to the appropriate Official Form and notice of entry thereof shall be mailed promptly as provided in Rule 2002(f) to the debtor, the trustee, creditors, equity security holders, and other parties in interest. Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

(*d*) *Retained power.*—Notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate.

Rule 5005. Filing and transmittal of papers.

(*a*) *Filing.*—The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U. S. C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

. . . . .

Rule 6002. Accounting by prior custodian of property of the estate.

. . . . .

(*b*) *Examination of administration.*—On the filing and transmittal of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after notice and a hearing, the court shall determine the propriety of the administration, including the reasonableness of all disbursements.

Rule 6006. Assumption, rejection and assignment of executory contracts and unexpired leases.

* * * * *

(*c*) *Notice.*—Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

Rule 6007. Abandonment or disposition of property.

(*a*) *Notice of proposed abandonment or disposition; objections; hearing.*—Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. A party in interest may file and serve an objection within 15 days of the mailing of the notice, or within the time fixed by the court. If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

(*b*) *Motion by party in interest.*—A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

(*c*) *[Abrogated]*

Rule 9002. Meanings of words in the federal rules of civil procedure when applicable to cases under the code.

The following words and phrases used in the Federal Rules of Civil Procedure made applicable to cases under the Code by these rules have the meanings indicated unless they are inconsistent with the context:

* * * * *

(4) "District court," "trial court," "court," "district judge," or "judge" means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge.

* * * * *

Rule 9019. Compromise and arbitration.

(*a*) *Compromise.*—On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

. . . . .

Rule 9036. Notice by electronic transmission.

Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic transmission is complete, and the sender shall have fully complied with the requirement to send notice, when the sender obtains electronic confirmation that the transmission has been received.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 22, 1993, pursuant to 28 U. S. C. § 2072, and were reported to Congress by The Chief Justice on the same date. For the letter of transmittal, see *post*, p. 1090. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, and 500 U. S. 963.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 22, 1993

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

JUSTICE WHITE has issued a separate statement. JUSTICE SCALIA has issued a dissenting statement, which JUSTICE THOMAS joins and JUSTICE SOUTER joins in part.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 1, 4, 5, 11, 12, 15, 16, 26, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 50, 52, 53, 54, 58, 71A, 72, 73, 74, 75, and 76, and new Rule 4.1, and abrogation of Form 18–A, and amendments to Forms 2, 33, 34, and 34A, and new Forms 1A, 1B, and 35.

[See *infra*, pp. 1103–1159.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

JUSTICE WHITE filed a statement.

Title 28 U. S. C. § 2072 empowers the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts, including proceedings before magistrates and courts of appeals.[1] But the Court does not itself draft and initially propose these rules. Section 2073 directs the Judicial Conference to prescribe the procedures for proposing the rules mentioned in § 2072. The Conference is authorized to appoint committees to propose such rules. These rules advisory committees are to be made up of members of the professional bar and trial and appellate judges. The Conference is also to appoint a standing committee on rules of practice and evidence to review the recommendations of the advisory committees and to recommend to the Conference such rules and amendments to those rules "as may be necessary to maintain consistency and otherwise promote the interest of justice." § 2073(b). Any rules approved by the Conference are transmitted to the Supreme Court, which in turn transmits any rules "prescribed" pursuant to § 2072 to the Congress. Except as provided in § 2074(b), such rules become effective at a specified time unless Congress otherwise provides.

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[1] Section 2075 vests a similar power in the Court with respect to rules for the bankruptcy courts.

The members of the advisory and standing committees are carefully named by THE CHIEF JUSTICE, and I am quite sure that these experienced judges and lawyers take their work very seriously. It is also quite evident that neither the standing committee nor the Judicial Conference merely rubber stamps the proposals recommended to it. It is not at all rare that advisory committee proposals are returned to the originating committee for further study.

During my 31 years on the Court, the number of advisory committees has grown as necessitated by statutory changes. During that time, by my count at least, on some 64 occasions we have "prescribed" and transmitted to Congress a new set of rules or amendments to certain rules. Some of the transmissions have been minor, but many of them have been extensive. Over this time, Justices Black and Douglas, either together or separately, dissented 13 times on the ground that it was inappropriate for the Court to pass on the merits of the rules before it.[2] Aside from those two Justices, Justices Powell, Stewart and then-JUSTICE REHNQUIST dissented on one occasion and JUSTICE O'CONNOR on another as to the substance of proposed rules. 446 U. S. 995, 997 (1980) (Powell, J., dissenting); 461 U. S. 1117, 1119 (1983) (O'CONNOR, J., dissenting). Only once in my memory did the Court refuse to transmit some of the rule changes proposed by the Judicial Conference. 500 U. S. 964 (1991).

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[2] 421 U. S. 1019, 1022 (1975) (Douglas, J., dissenting); 416 U. S. 1001, 1003 (1974) (Douglas, J., dissenting); 411 U. S. 989, 992 (1973) (Douglas, J., dissenting); 409 U. S. 1132 (1972) (Douglas, J., dissenting); 406 U. S. 979, 981 (1972) (Douglas, J., dissenting); 401 U. S. 1017, 1019 (1971) (Black and Douglas, JJ., dissenting); 400 U. S. 1029, 1031 (1971) (Black, J., with whom Douglas, J., joins, dissenting); 398 U. S. 977, 979 (1970) (Black and Douglas, JJ., dissenting); 395 U. S. 989, 990 (1969) (Black, J., not voting); 383 U. S. 1087, 1089 (1966) (Black, J., dissenting); *ibid.* (Douglas, J., dissenting in

That the Justices have hardly ever refused to transmit the rules submitted by the Judicial Conference and the fact that, aside from Justices Black and Douglas, it has been quite rare for any Justice to dissent from transmitting any such rule, suggest that a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process. The vast majority (including myself) obviously have not explicitly subscribed to the Black-Douglas view that many of the rules proposed dealt with substantive matters that the Constitution reserved to Congress and that in any event were prohibited by §2072's injunction against abridging, enlarging, or modifying substantive rights.

Some of us, however, have silently shared Justice Black's and Justice Douglas' suggestion that the enabling statutes be amended

> "to place the responsibility upon the Judicial Conference rather than upon this Court. Since the statute was first enacted in 1934, 48 Stat. 1064, the Judicial Conference has been enlarged and improved and is now very active in its surveillance of the work of the federal courts and in recommending appropriate legislation to Congress. The present rules produced under 28 U. S. C. §2072 are not prepared by us but by Committees of the Judicial Conference designated by THE CHIEF JUSTICE, and before coming to us they are approved by the Judicial Conference pursuant to 28 U. S. C. §331. The Committees and the Conference are composed of able and distin-

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part); 383 U. S. 1029, 1032 (1966) (Black, J., dissenting); 374 U. S. 861, 865 (1963) (Black and Douglas, JJ., dissenting).

> guished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." 374 U. S. 865, 869–870 (1963) (footnote omitted).

Despite the repeated protestations of both or one of those Justices, Congress did not eliminate our participation in the rulemaking process. Indeed, our statutory role was continued as the coverage of § 2072 was extended to the rules of evidence and to proceedings before magistrates. Congress clearly continued to direct us to "prescribe" specified rules. But most of us concluded that for at least two reasons Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference. First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some us, and I remain of this view, were quite sure that the Judicial Conference and its committees, "being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we." 383 U. S. 1089, 1090 (1966) (Douglas, J., dissenting in part).

I did my share of litigating when in practice and once served on the Advisory Committee for the Civil Rules, but the trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved. At the very least, we should not perform a *de novo* review and should defer to the Judicial Conference and its committees as long as they have some rational basis for their proposed amendments.

Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. If it has not, such a fact, or even such a claim, about a body so open to public inspection would inevitably surface. This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had serious questions about the wisdom of particular proposals to amend certain rules.

In connection with the proposed rule changes now before us, there is no suggestion that the rulemaking process has failed to function properly. No doubt the proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.

Justice Douglas thought that the Court should be taken out of the rulemaking process entirely, but as long as Congress insisted on our "prescribing" rules, he refused to be a mere conduit and would dissent to forwarding rule changes with which he disagreed. I note that JUSTICE SCALIA seems to follow that example. But I also note that as time went on, Justice Douglas confessed to insufficient familiarity with the context in which new rules would operate to pass judgment on their merits.[3]

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[3] In dissenting from the order transmitting the Chapter XIII Bankruptcy Rules, Justice Douglas, among other things said: "Forty years ago I had perhaps some expertise in the field; and I know enough about history, our Constitution, and our decisions to oppose the adoption of Rule

In conclusion, I suggest that it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules which come to us for transmittal. As I have said, over the years our role has been a much more limited one.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE SOUTER joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

I

Rule 11

It is undeniably important to the Rules' goal of "the just, speedy, and inexpensive determination of every action," Fed. Rule Civ. Proc. 1, that frivolous pleadings and motions be deterred. The current Rule 11 achieves that objective by requiring sanctions when its standards are violated (though leaving the court broad discretion as to the manner of sanction), and by allowing compensation for the moving party's expenses and attorney's fees. The proposed revision would

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920. But for most of these Rules I do not have sufficient insight and experience to know whether they are desirable or undesirable. I must, therefore, disassociate myself from them." 411 U. S. 992, 994 (1973).

With respect to Amendments to the Rules of Criminal Procedure forwarded by the Court a year later, the following statement was appended to the Court's order, 416 U. S. 1003 (1974): "MR. JUSTICE DOUGLAS is opposed to the Court's being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution."

render the Rule toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses, and by providing a 21-day "safe harbor" within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.

To take the last first: In my view, those who file frivolous suits and pleadings should have no "safe harbor." The Rules should be solicitous of the abused (the courts and the opposing party) and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty. The proposed revision contradicts what this Court said only three years ago: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 398 (1990). The advisory committee itself was formerly of the same view. *Ibid.* (quoting Letter from Chairman, Advisory Committee on Civil Rules).

The proposed Rule also decreases both the likelihood and the severity of punishment for those foolish enough not to seek refuge in the safe harbor after an objection is raised. Proposed subsection (c) makes the issuance of any sanction discretionary, whereas currently it is *required.* Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession. They do not immediately see, moreover, the systemwide benefits of serious Rule 11 sanctions, though they are intensely aware of the amount of their own time it would take to consider and apply sanctions in the case before them. For these reasons, I think it important to the effectiveness of the scheme that the sanctions remain mandatory.

Finally, the likelihood that frivolousness will even be *challenged* is diminished by the proposed Rule, which restricts the award of compensation to "unusual circumstances," with monetary sanctions "ordinarily" to be payable to the court. Advisory Committee Notes to Proposed Rule 11, pp. 53–54. Under Proposed Rule 11(c)(2), a court may order payment for "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" only when that is "warranted for effective deterrence." Since the deterrent effect of a fine is rarely increased by altering the identity of the payee, it takes imagination to conceive of instances in which this provision will ever apply. And the commentary makes it clear that even when compensation is granted it should be granted stingily—only for costs "directly and unavoidably caused by the violation." *Id.*, at 54. As seen from the viewpoint of the victim of an abusive litigator, these revisions convert Rule 11 from a means of obtaining compensation to an invitation to throw good money after bad. The net effect is to decrease the incentive on the part of the person best situated to alert the court to perversion of our civil justice system.

I would not have registered this dissent if there were convincing indication that the current Rule 11 regime is ineffective or encourages excessive satellite litigation. But there appears to be general agreement, reflected in a recent report of the advisory committee itself, that Rule 11, as written, basically works. According to that report, a Federal Judicial Center survey showed that 80% of district judges believe Rule 11 has had an overall positive effect and should be retained in its present form, 95% believed the Rule had not impeded development of the law, and about 75% said the benefits justify the expenditure of judicial time. See Interim Report on Rule 11, Advisory Committee on Civil Rules, reprinted in G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, App. I–8 to I–10 (2d ed. 1991). True, many lawyers do not like Rule 11. It may cause them financial liability, it may damage their professional reputation in front of important clients, and the cost-of-litigation savings it produces are savings not to lawyers but to litigants. But the overwhelming approval of the Rule by the federal district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.[1]

II

Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rules 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery.* It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

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[1] I do not disagree with the proposal to make law firms liable for an attorney's misconduct under the Rule, see Proposed Rule 11(c), or with the proposal that Rule 11 sanctions be applied when claims in pleadings that at one time were not in violation of the Rule are pursued after it is evident that they lack support, see Proposed Rule 11(b); Advisory Committee Notes to Proposed Rule 11, p. 51.

It is curious that the proposed Rule regarding sanctions for discovery abuses *requires* sanctions, and specifically recommends financial sanctions and compensation to the moving party. See Proposed Rules 37(a)(4)(A), (c)(1). No explanation for the inconsistency is given.

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed Rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101–650, §§104, 105, 104 Stat. 5097–5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§471, 473(a)(2)(C). Under that legislation, short-term experiments relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101–650, § 105, 104 Stat. 5097–5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.[2] See Fed. Rule Civ. Proc. 26.

I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar, and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28–32, and nn. 107–121 (1992). Indeed, after the proposed Rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. § 2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

* * *

Constant reform of the federal rules to correct emerging problems is essential. JUSTICE WHITE observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 1095–1096, and n. 3. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

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[2] For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

In the respects described, I dissent from the Court's order.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and purpose of rules.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Rule 4. Summons.

(*a*) *Form.*—The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(*b*) *Issuance.*—Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

(*c*) *Service with complaint; by whom made.*

(1) A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person ef-

fecting service with the necessary copies of the summons and complaint.

(2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U. S. C. § 1915 or is authorized to proceed as a seaman under 28 U. S. C. § 1916.

(*d*) *Waiver of service; duty to save costs of service; request to waive.*

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(A) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to

Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(*e*) *Service upon individuals within a judicial district of the United States.*—Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or

(2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(*f*) *Service upon individuals in a foreign country.*—Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

(*g*) *Service upon infants and incompetent persons.*—Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.

(*h*) *Service upon corporations and associations.*—Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(*i*) *Service upon the United States, and its agencies, corporations, or officers.*

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

(*j*) *Service upon foreign, state, or local governments.*

(1) Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U. S. C. § 1608.

(2) Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(*k*) *Territorial limits of effective service.*

(1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

(A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or

(B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or

(C) who is subject to the federal interpleader jurisdiction under 28 U. S. C. § 1335, or

(D) when authorized by a statute of the United States.

(2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

(*l*) *Proof of service.*—If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

(*m*) *Time limit for service.*—If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

(*n*) *Seizure of property; service of summons not feasible.*

(1) If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule.

(2) Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.

Rule 4.1. Service of other process.

(*a*) *Generally.*—Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.

(*b*) *Enforcement of orders: commitment for civil contempt.*—An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.

Rule 5. Service and filing of pleadings and other papers.

. . . . .

(*e*) *Filing with the court defined.*—The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

Rule 11. Signing of pleadings, motions, and other papers; representations to court; sanctions.

(*a*) *Signature.*—Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(*b*) *Representations to court.*—By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(*c*) *Sanctions.*—If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

> (*1*) *How initiated.*
>
> (*A*) *By motion.*—A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided

in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(*B*) *On court's initiative.*—On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(*2*) *Nature of sanction; limitations.*—A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

> (A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).
>
> (B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(*3*) *Order.*—When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(*d*) *Inapplicability to discovery.*—Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Rule 12. Defenses and objections—when and how presented—by pleading or motion—motion for judgment on the pleadings.

(*a*) *When presented.*

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:

(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

. . . . .

Rule 15. Amended and supplemental pleadings.

. . . . .

(c) *Relation back of amendments.*—An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

. . . . .

Rule 16. Pretrial conferences; scheduling; management.

. . . . .

(*b*) *Scheduling and planning.*—Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;
(2) to file motions; and
(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(6) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

(*c*) *Subjects for consideration at pretrial conferences.*—At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipu-

lations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters to a magistrate judge or master;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

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Rule 26. General provisions governing discovery; duty of disclosure.

(*a*) *Required disclosures; methods to discover additional matter.*

(*1*) *Initial disclosures.*—Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(*2*) *Disclosure of expert testimony.*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(*3*) *Pretrial disclosures.*—In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(*4*) *Form of disclosures; filing.*—Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(*5*) *Methods to discover additional matter.*—Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(*b*) *Discovery scope and limits.*—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(*1*) *In general.*—Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(*2*) *Limitations.*—By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

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(*4*) *Trial preparation: experts.*

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in

Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of privilege or protection of trial preparation materials.*—When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(*c*) *Protective orders.*—Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(*d*) *Timing and sequence of discovery.*—Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(*e*) *Supplementation of disclosures and responses.*—A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(*f*) *Meeting of parties; planning for discovery.*—Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of disclosures, discovery requests, responses, and objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Rule 28. Persons before whom depositions may be taken.

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(*b*) *In foreign countries.*—Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

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Rule 29. Stipulations regarding discovery procedure.

Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

Rule 30. Depositions upon oral examination.

(*a*) *When depositions may be taken; when leave required.*

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) Notice of examination: general requirements; method of recording; production of documents and things; deposition of organization; deposition by telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear

the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

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(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

(c) *Examination and cross-examination; record of examination; oath; objections.*—Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(*d*) *Schedule and duration; motion to terminate or limit examination.*

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs

and attorney's fees incurred by any parties as a result thereof.

(3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(*e*) *Review by witness; changes; signing.*—If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(*f*) *Certification and filing by officer; exhibits; copies; notice of filing.*

(1) The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court,

the officer shall securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

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Rule 31. Depositions upon written questions.

(*a*) *Serving questions; notice.*

(1) A party may take the testimony of any person, including a party, by deposition upon written questions

without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined has already been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d).

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

(4) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

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Rule 32. Use of depositions in court proceedings.

(*a*) *Use of depositions.*

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(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition; nor shall a deposition be used against a party who, having received less than 11 days notice of a deposition, has promptly upon receiving such notice filed a motion for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place and such motion is pending at the time the deposition is held.

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(*c*) *Form of presentation.*—Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

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Rule 33. Interrogatories to parties.

(*a*) *Availability.*—Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2). Without leave of court or written stipulation, interrogatories may not be served before the time specified in Rule 26(d).

(*b*) *Answers and objections.*

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated

in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(*c*) *Scope; use at trial.*—Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(*d*) *Option to produce business records.*

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Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

. . . . .

(*b*) *Procedure.*—The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

. . . . .

Rule 36. Requests for admission.

(*a*) *Request for admission.*—A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

. . . . .

Rule 37. Failure to make disclosure or cooperate in discovery: sanctions.

(*a*) *Motion for order compelling disclosure or discovery.*—A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(*1*) *Appropriate court.*—An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(*2*) *Motion.*

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(*3*) *Evasive or incomplete disclosure, answer, or response.*—For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(*4*) *Expenses and sanctions.*

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

. . . . .

(c) *Failure to disclose; false or misleading disclosure; refusal to admit.*

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or

the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(*d*) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.*—If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

. . . . .

(*g*) *Failure to participate in the framing of a discovery plan.*—If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 38. Jury trial of right.

. . . . .

(*b*) *Demand.*—Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

. . . . .

(*d*) *Waiver.*—The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 50. Judgment as a matter of law in actions tried by jury; alternative motion for new trial; conditional rulings.

(*a*) *Judgment as a matter of law.*

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be

maintained or defeated without a favorable finding on that issue.

. . . . .

Rule 52. Findings by the court; judgment on partial findings.

. . . . .

(*c*) *Judgment on partial findings.*—If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Rule 53. Masters.

(*a*) *Appointment and compensation.*—The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(*b*) *Reference.*—A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

* * * * *

(*f*) *Application to magistrate judge.*—A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

Rule 54. Judgments; costs.

* * * * *

(*d*) *Costs; attorneys' fees.*

(*1*) *Costs other than attorneys' fees.*—Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(*2*) *Attorneys' fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a), and a judgment shall be set forth in a separate document as provided in Rule 58.

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision (b) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) The provisions of subparagraphs (A) through (D) do not apply to claims for fees and expenses as sanctions for violations of these rules or under 28 U. S. C. § 1927.

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 71A. Condemnation of property.

. . . . .

(*d*) *Process.*

. . . . .

(*3*) *Service of notice.*

(*A*) *Personal service.*—Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.

(*B*) *Service by publication.*

. . . . .

(*4*) *Return; amendment.*—Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.

. . . . .

Rule 72. Magistrate judges; pretrial orders.

(*a*) *Nondispositive matters.*—A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(*b*) *Dispositive motions and prisoner petitions.*—A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Rule 73. Magistrate judges; trial by consent and appeal options.

(*a*) *Powers; procedure.*—When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U. S. C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U. S. C. § 636(c)(7).

(*b*) *Consent.*—When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U. S. C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

A district judge, magistrate judge, or other court official may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge.

The district judge, for good cause shown on the judge's own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.

(*c*) *Normal appeal route.*—In accordance with Title 28, U. S. C. § 636(c)(3), unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule, appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

(*d*) *Optional appeal route.*—In accordance with Title 28, U. S. C. §636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge of the court and thereafter, by petition only, to the court of appeals.

Rule 74. Method of appeal from magistrate judge to district judge under Title 28, U. S. C. §636(c)(4) and Rule 73(d).

(*a*) *When taken.*—When the parties have elected under Rule 73(d) to proceed by appeal to a district judge from an appealable decision made by a magistrate judge under the consent provisions of Title 28, U. S. C. §636(c)(4), an appeal may be taken from the decision of a magistrate judge by filing with the clerk of the district court a notice of appeal within 30 days of the date of entry of the judgment appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by the timely filing of any of the following motions with the magistrate judge by any party, and the full time for appeal from the judgment entered by the magistrate judge commences to run anew from entry of any of the following orders: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

An interlocutory decision or order by a magistrate judge which, if made by a district judge, could be appealed under any provision of law, may be appealed to a district judge by filing a notice of appeal within 15 days after entry of the decision or order, provided the parties have elected to appeal to a district judge under Rule 73(d). An appeal of such interlocutory decision or order shall not stay the proceedings before the magistrate judge unless the magistrate judge or district judge shall so order.

Upon a showing of excusable neglect, the magistrate judge may extend the time for filing a notice of appeal upon motion filed not later than 20 days after the expiration of the time otherwise prescribed by this rule.

. . . . .

(c) *Stay pending appeal.*—Upon a showing that the magistrate judge has refused or otherwise failed to stay the judgment pending appeal to the district judge under Rule 73(d), the appellant may make application for a stay to the district judge with reasonable notice to all parties. The stay may be conditioned upon the filing in the district court of a bond or other appropriate security.

. . . . .

Rule 75. Proceedings on appeal from magistrate judge to district judge under Rule 73(d).

. . . . .

(*b*) *Record on appeal.*

(*1*) *Composition.*—The original papers and exhibits filed with the clerk of the district court, the transcript of the proceedings, if any, and the docket entries shall constitute the record on appeal. In lieu of this record the parties, within 10 days after the filing of the notice of appeal, may file a joint statement of the case showing how the issues presented by the appeal arose and were decided by the magistrate judge, and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented.

(*2*) *Transcript.*—Within 10 days after filing the notice of appeal the appellant shall make arrangements for the production of a transcript of such parts of the proceedings as the appellant deems necessary. Unless the entire transcript is to be included, the appellant, within the time provided above, shall serve on the appellee and file with the court a description of the parts of the transcript which the appellant intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, within 10 days after the service of the statement of the appellant, the appellee shall serve on the appellant and file with the court a designation of additional parts to be included. The appellant shall promptly make arrangements for the inclusion of all such parts unless the magistrate judge, upon motion, exempts the appellant from providing certain parts, in which case the appellee may provide for their transcription.

(*3*) *Statement in lieu of transcript.*—If no record of the proceedings is available for transcription, the parties shall, within 10 days after the filing of the notice of appeal, file a statement of the evidence from the best available means to be submitted in lieu of the transcript. If the parties cannot agree they shall submit a statement of their differences to the magistrate judge for settlement.

. . . . .

Rule 76. Judgment of the district judge on the appeal under Rule 73(d) and costs.

(*a*) *Entry of judgment.*—When the parties have elected under Rule 73(d) to appeal from a judgment of the magistrate judge to a district judge, the clerk shall prepare, sign, and enter judgment in accordance with the order or decision of the district judge following an appeal from a judgment of the magistrate judge, unless the district judge directs otherwise. The clerk shall mail to all parties a copy of the order or decision of the district judge.

. . . . .

(c) *Costs.*—Except as otherwise provided by law or ordered by the district judge, costs shall be taxed against the losing party; if a judgment of the magistrate judge is affirmed in part or reversed in part, or is vacated, costs shall be allowed only as ordered by the district judge. The cost of the transcript, if necessary for the determination of the appeal, and the premiums paid for bonds to preserve rights pending appeal shall be taxed as costs by the clerk.

APPENDIX OF FORMS

FORM 1A. NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

TO: ______________________ (A) ______________________

[as ____________ (B) ____________ of ____________ (C) ____________]

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the United States District Court for the ____________ (D) ____________ and has been assigned docket number ________ (E) ________ .

This is not a formal summons or notification from the court, but rather my request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within ________ (F) ________ days after the date designated below as the date on which this Notice and Request is sent. I enclose a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent (or before 90 days from that date if your address is not in any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Federal Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this __________ day of __________, _____.

____

Signature of Plaintiff's Attorney or
Unrepresented Plaintiff

Notes:

A—Name of individual defendant (or name of officer or agent of corporate defendant)

B—Title, or other relationship of individual to corporate defendant

C—Name of corporate defendant, if any

D—District

E—Docket number of action

F—Addressee must be given at least 30 days (60 days if located in foreign country) in which to return waiver

Form 1B. Waiver of Service of Summons

TO: ______ (name of plaintiff's attorney or unrepresented plaintiff) ______

I acknowledge receipt of your request that I waive service of a summons in the action of ______ (caption of action) ______ which is case number ______ (docket number) ______ in the United States District Court for the ______ (district) ______. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after ______ (date request was sent) ______, or within 90 days after that date if the request was sent outside the United States.

______ ______

Date *Signature*

Printed/typed name: ______

[as ______]

[of ______]

To be printed on reverse side of the waiver form or set forth at the foot of the form:

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for its failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

FORM 2. ALLEGATION OF JURISDICTION

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a [citizen of the State of Connecticut][1] [corporation incorporated under the laws of the State of Connecticut having its principal place of business in the State of Connecticut] and defendant is a corporation incorporated under the laws of the State of New York having its principal place of business in a State other than the State of Connecticut. The matter in controversy exceeds, exclusive of interest and costs, the sum of fifty thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question.

The action arises under [the Constitution of the United States, Article _____, Section _____]; [the _____ Amendment to the Constitution of the United States, Section _____]; [the Act of _____, _____ Stat. _____; U. S. C., Title _____, § _____]; [the Treaty of the United States (here describe the treaty)][2] as hereinafter more fully appears.

. . . . .

FORM 18-A. [Abrogated]

FORM 33. NOTICE OF AVAILABILITY OF A MAGISTRATE JUDGE TO EXERCISE JURISDICTION AND APPEAL OPTION

In accordance with the provisions of Title 28, U. S. C. § 636(c), you are hereby notified that a United States magistrate judge of this district court is available to exercise the court's jurisdiction and to conduct any or all proceedings in this case including a jury or nonjury trial, and entry of a final judgment. Exercise of this jurisdiction by a magistrate judge is, however, permitted only if all parties voluntarily consent.

You may, without adverse substantive consequences, withhold your consent, but this will prevent the court's jurisdiction from being exercised by a magistrate judge. If any party withholds consent, the identity of the parties consenting or withholding consent will not be communicated to any magistrate judge or to the district judge to whom the case has been assigned.

An appeal from a judgment entered by a magistrate judge may be taken directly to the United States court of appeals for this judicial circuit in the same manner as an appeal from any other judgment of a district court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a magistrate judge may be taken directly to a district judge. Cases in which an appeal is taken to a district judge may be reviewed by the United States court of appeals for this judicial circuit only by way of petition for leave to appeal.

Copies of the Form for the "Consent to Jurisdiction by a United States Magistrate Judge" and "Election of Appeal to a District Judge" are available from the clerk of the court.

FORM 34. CONSENT TO EXERCISE OF JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE, ELECTION OF APPEAL TO DISTRICT JUDGE

UNITED STATES DISTRICT COURT
____________ DISTRICT OF ____________

Plaintiff, vs. Defendant.	Docket No. ________

CONSENT TO JURISDICTION BY A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U. S. C. § 636(c), the undersigned party or parties to the above-captioned civil matter hereby voluntarily consent to have a United States magistrate judge conduct any and all further proceedings in the case, including trial, and order the entry of a final judgment.

____________ ________________________

Date *Signature*

ELECTION OF APPEAL TO DISTRICT JUDGE

[Do not execute this portion of the Consent Form if you desire that the appeal lie directly to the court of appeals.]

In accordance with the provisions of Title 28, U. S. C. § 636(c)(4), the undersigned party or parties elect to take any appeal in this case to a district judge of this court.

________________ ________________________________

Date *Signature*

Note: Return this form to the Clerk of the Court if you consent to jurisdiction by a magistrate judge. Do not send a copy of this form to any district judge or magistrate judge.

FORM 34A. ORDER OF REFERENCE

UNITED STATES DISTRICT COURT
__________ DISTRICT OF __________

Plaintiff,
vs. } Docket No. ________
Defendant.

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate Judge __________ for all further proceedings and entry of judgment in accordance with Title 28, U. S. C. § 636(c) and the consent of the parties.

____

U. S. District Judge

FORM 35. REPORT OF PARTIES' PLANNING MEETING

[Caption and Names of Parties]

1. Pursuant to Fed. R. Civ. P. 26(f), a meeting was held on __(date)__ at __(place)__ and was attended by:

__(name)__ for plaintiff(s)
__(name)__ for defendant(s) __(party name)__
__(name)__ for defendant(s) __(party name)__

2. Pre-Discovery Disclosures. The parties [have exchanged] [will exchange by __(date)__] the information required by [Fed. R. Civ. P. 26(a)(1)] [local rule ______].

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects:
__(brief description of subjects on which discovery will be needed)__

All discovery commenced in time to be completed by ____(date)____.
[Discovery on ____(issue for early discovery)____ to be completed by ____(date)____.]

Maximum of ____ interrogatories by each party to any other party. [Responses due ____ days after service.]

Maximum of ____ requests for admission by each party to any other party. [Responses due ____ days after service.]

Maximum of ________ depositions by plaintiff(s) and ________ by defendant(s).

Each deposition [other than of ____] limited to maximum of ____ hours unless extended by agreement of parties.

Reports from retained experts under Rule 26(a)(2) due:
from plaintiff(s) by ____(date)____
from defendant(s) by ____(date)____

Supplementations under Rule 26(e) due ____(time(s) or interval(s))____).

4. Other Items. [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

The parties [request] [do not request] a conference with the court before entry of the scheduling order.

The parties request a pretrial conference in ____(month and year)____.

Plaintiff(s) should be allowed until ____(date)____ to join additional parties and until ____(date)____ to amend the pleadings.

Defendant(s) should be allowed until ____(date)____ to join additional parties and until ____(date)____ to amend the pleadings.

All potentially dispositive motions should be filed by ____(date)____.

Settlement [is likely] [is unlikely] [cannot be evaluated prior to ____(date)____] [may be enhanced by use of the following alternative dispute resolution procedure: [________________________].

Final lists of witnesses and exhibits under Rule 26(a)(3) should be due
from plaintiff(s) by ____(date)____
from defendant(s) by ____(date)____

Parties should have ____ days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3).

The case should be ready for trial by ____(date)____ [and at this time is expected to take approximately ____(length of time)____].

[Other matters.]

Date: ________

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 22, 1993, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1162. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, and 500 U. S. 991.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 22, 1993

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure and an amendment to Rule 8 of the Rules Governing Section 2255 Proceedings that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58, and new Rule 26.3, and an amendment to Rule 8 of the Rules Governing Section 2255 Proceedings.

[See *infra*, pp. 1165–1186.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1993, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 1. Scope.

These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers.

Rule 3. The complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge.

Rule 4. Arrest warrant or summons upon complaint.

. . . . .

(*c*) *Form.*

(*1*) *Warrant.*—The warrant shall be signed by the magistrate judge and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available magistrate judge.

. . . . .

(*d*) *Execution or service; and return.*

. . . . .

(*4*) *Return.*—The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to and canceled by the magistrate judge by whom it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate judge before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or summons returned unserved or a duplicate thereof may be delivered by the magistrate judge to the marshal or other authorized person for execution or service.

Rule 5. Initial appearance before the magistrate judge.

(*a*) *In general.*—An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U. S. C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule.

(*b*) *Misdemeanors and other petty offenses.*—If the charge against the defendant is a misdemeanor or other petty offense triable by a United States magistrate judge under 18 U. S. C. § 3401, the magistrate judge shall proceed in accordance with Rule 58.

(*c*) *Offenses not triable by the United States magistrate judge.*—If the charge against the defendant is not triable by the United States magistrate judge, the defendant shall not be called upon to plead. The magistrate judge shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The magistrate judge shall inform the defendant that the defendant is not required to make a statement and that any statement made by the defendant may be used against the defendant. The magistrate judge shall also inform the defendant of the right to a preliminary examination. The magistrate judge shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate judge shall forthwith hold the defendant to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate judge shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate judge. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

Rule 5.1. Preliminary examination.

(*a*) *Probable cause finding.*—If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate judge shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(*b*) *Discharge of defendant.*—If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

(*c*) *Records.*—After concluding the proceeding the federal magistrate judge shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate judge shall promptly make or cause to be made a record or summary of such proceeding.

> (1) On timely application to a federal magistrate judge, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of the hearing on preliminary examination made available to that attorney in connection with any further hearing or preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.
>
> (2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate judge make available a copy of the transcript, or of a portion thereof, to defense counsel. Such order shall provide for prepayment of costs of such transcript by the defendant unless the defendant makes

a sufficient affidavit that the defendant is unable to pay or to give security therefor, in which case the expense shall be paid by the Director of the Administrative Office of the United States Courts from available appropriated funds. Counsel for the government may move also that a copy of the transcript, in whole or in part, be made available to it, for good cause shown, and an order may be entered granting such motion in whole or in part, on appropriate terms, except that the government need not prepay costs nor furnish security therefor.

Rule 6. The grand jury.

. . . . .

(*e*) *Recording and disclosure of proceedings.*

. . . . .

(*4*) *Sealed indictments.*—The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

. . . . .

(*f*) *Finding and return of indictment.*—An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in finding an indictment, the foreperson shall so report to a federal magistrate judge in writing forthwith.

. . . . .

Rule 9. Warrant or summons upon indictment or information.

(*a*) *Issuance.*—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue. When a defendant arrested with a warrant or given a summons appears initially before a magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of Rule 5.

(*b*) *Form.*

(*1*) *Warrant.*—The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the nearest available magistrate judge. The amount of bail may be fixed by the court and endorsed on the warrant.

(*2*) *Summons.*—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate judge at a stated time and place.

(*c*) *Execution or service; and return.*

(*1*) *Execution or service.*—The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U. S. C. § 3041.

(*2*) *Return.*—The officer executing a warrant shall make return thereof to the magistrate judge or other officer before whom the defendant is brought. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

. . . . .

Rule 12. Pleadings and motions before trial; defenses and objections.

. . . . .

(*i*) *Production of statements at suppression hearing.*—Rule 26.2 applies at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer is deemed a government witness.

Rule 16. Discovery and inspection.

(*a*) *Governmental disclosure of evidence.*

(*1*) *Information subject to disclosure.*

. . . . .

(*E*) *Expert witnesses.*—At the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons therefor, and the witnesses' qualifications.

(*2*) *Information not subject to disclosure.*—Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U. S. C. § 3500.

. . . . .

(*b*) *The defendant's disclosure of evidence.*

(*1*) *Information subject to disclosure.*

. . . . .

(*C*) *Expert witnesses.*—If the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, the defendant, at the government's request, must disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703 and 705 of the Federal Rules of Evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons therefor, and the witnesses' qualifications.

. . . . .

Rule 17. Subpoena.

(*a*) *For attendance of witnesses; form; issuance.*—A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate judge in a proceeding before that magistrate judge, but it need not be under the seal of the court.

. . . . .

(*g*) *Contempt.*—Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it was issued if it was issued by a United States magistrate judge.

. . . . .

Rule 26.2. Production of witness statements.

. . . . .

(*c*) *Production of excised statement.*—If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the government, and, if the defendant appeals a conviction, must be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(*d*) *Recess for examination of statement.*—Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings so that counsel may examine the statement and prepare to use it in the proceedings.

. . . . .

(*g*) *Scope of rule.*—This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

(1) in Rule 32(f) at sentencing;

(2) in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release;

(3) in Rule 46(i) at a detention hearing; and

(4) in Rule 8 of the Rules Governing Proceedings under 28 U. S. C. § 2255.

Rule 26.3. Mistrial.

Before ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

Rule 32. Sentence and judgment.

. . . . .

(*e*) *Production of statements at sentencing hearing.*

(*1*) *In general.*—Rule 26.2 (a)–(d), and (f) applies at a sentencing hearing under this rule.

(*2*) *Sanctions for failure to produce statement.*—If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

. . . . .

Rule 32.1. Revocation or modification of probation or supervised release.

. . . . .

(*c*) *Production of statements.*

(*1*) *In general.*—Rule 26.2(a)–(d) and (f) applies at any hearing under this rule.

(*2*) *Sanctions for failure to produce statement.*—If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld.

Rule 40. Commitment to another district.

(*a*) *Appearance before federal magistrate judge.*—If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person must be taken without unnecessary delay before the nearest available federal magistrate judge. Preliminary proceedings concerning the defendant must be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending—provided that a warrant is issued in that district if the arrest was made without a warrant—upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.

(*b*) *Statement by federal magistrate judge.*—In addition to the statements required by Rule 5, the federal magistrate judge shall inform the defendant of the provisions of Rule 20.

• • • • •

(*d*) *Arrest of probationer or supervised releasee.*—If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person must be taken without unnecessary delay before the nearest available federal magistrate judge. The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district hav-

ing jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate judge is the person named in the warrant.

(*e*) *Arrest for failure to appear.*—If a person is arrested on a warrant in a district other than that in which the warrant was issued, and the warrant was issued because of the failure of the person named therein to appear as required pursuant to a subpoena or the terms of that person's release, the person arrested must be taken without unnecessary delay before the nearest available federal magistrate judge. Upon production of the warrant or a certified copy thereof and upon a finding that the person before the magistrate judge is the person named in the warrant, the federal magistrate judge shall hold the person to answer in the district in which the warrant was issued.

(*f*) *Release or detention.*—If a person was previously detained or conditionally released, pursuant to chapter 207 of title 18, United States Code, in another district where a warrant, information, or indictment issued, the federal magistrate judge shall take into account the decision previously made and the reasons set forth therefor, if any, but will not be bound by that decision. If the federal magistrate judge amends the release or detention decision or alters the conditions of release, the magistrate judge shall set forth the reasons therefor in writing.

Rule 41. Search and seizure.

(*a*) *Authority to issue warrant.*—Upon the request of a federal law enforcement officer or an attorney for the government, a search warrant authorized by this rule may be issued (1) by a federal magistrate judge, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate judge for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed.

* * * * *

(*c*) *Issuance and contents.*

(*1*) *Warrant upon affidavit.*—A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate judge to whom it shall be returned.

(*2*) *Warrant upon oral testimony.*

(*A*) *General rule.*—If the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit, a Federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone or other appropriate means, including facsimile transmission.

(*B*) *Application.*—The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate judge. The Federal magistrate judge shall enter, verbatim, what is so read to such magistrate judge on a document to be known as the original warrant. The Federal magistrate judge may direct that the warrant be modified.

(*C*) *Issuance.*—If the Federal magistrate judge is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate judge's name on the duplicate original warrant. The Federal magistrate judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(*D*) *Recording and certification of testimony.*—When a caller informs the Federal magistrate judge that the purpose of the call is to request a warrant, the Federal magistrate judge shall immediately place under oath each person whose testimony forms a basis of the application and each person

> applying for that warrant. If a voice recording device is available, the Federal magistrate judge shall record by means of such device all of the call after the caller informs the Federal magistrate judge that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate judge shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate judge shall file a signed copy with the court.

. . . . .

(*d*) *Execution and return with inventory.*—The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate judge shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

. . . . .

(*g*) *Return of papers to clerk.*—The federal magistrate judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

. . . . .

Rule 44. Right to and assignment of counsel.

(*a*) *Right to assigned counsel.*—Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate judge or the court through appeal, unless the defendant waives such appointment.

. . . . .

Rule 46. Release from custody.

. . . . .

(*i*) *Production of statements.*

(*1*) *In general.*—Rule 26.2(a)–(d) and (f) applies at a detention hearing held under 18 U. S. C. §3144, unless the court, for good cause shown, rules otherwise in a particular case.

(*2*) *Sanctions for failure to produce statement.*—If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, at the detention hearing the court may not consider the testimony of a witness whose statement is withheld.

Rule 49. Service and filing of papers.

. . . . .

(*e*) *Filing of dangerous offender notice.*—A filing with the court pursuant to 18 U. S. C. §3575(a) or 21 U. S. C. §849(a) shall be made by filing the notice with the clerk of the court. The clerk shall transmit the notice to the chief judge or, if the chief judge is the presiding judge in the case, to another judge or United States magistrate judge in the district, except that in a district having a single judge and no United States magistrate judge, the clerk shall transmit the notice to the court only after the time for disclosure specified in the aforementioned statutes and shall seal the notice as permitted by local rule.

Rule 50. Calendars; plans for prompt disposition.

* * * * *

(*b*) *Plans for achieving prompt disposition of criminal cases.*—To minimize undue delay and to further the prompt disposition of criminal cases, each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrate judges of the district and shall prepare plans for the prompt disposition of criminal cases in accordance with the provisions of Chapter 208 of Title 18, United States Code.

Rule 54. Application and exception.

* * * * *

(*b*) *Proceedings.*

* * * * *

(*3*) *Peace bonds.*—These rules do not alter the power of judges of the United States or of United States magistrate judges to hold to security of the peace and for good behavior under Revised Statutes, § 4069, 50 U. S. C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.

(*4*) *Proceedings before United States magistrate judges.*—Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.

* * * * *

(*c*) *Application of terms.*—As used in these rules the following terms have the designated meanings.

* * * * *

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U. S. C. §§ 631–639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of a district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial decisions.

"Magistrate judge" includes a United States magistrate judge as defined in 28 U. S. C. §§631–639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U. S. C. §3041 to perform the functions prescribed in Rules 3, 4, and 5.

"Oath" includes affirmations.

"Petty offense" is defined in 18 U. S. C. §19.

"State" includes District of Columbia, Puerto Rico, territory and insular possession.

"United States magistrate judge" means the officer authorized by 28 U. S. C. §§631–639.

Rule 55. Records.

The clerk of the district court and each United States magistrate judge shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made.

Rule 57. Rules by district courts.

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrate judges may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

Rule 58. Procedure for misdemeanors and other petty offenses.

(*a*) *Scope.*

(*1*) *In general.*—This rule governs the procedure and practice for the conduct of proceedings involving misdemeanors and other petty offenses, and for appeals to judges of the district courts in such cases tried by United States magistrate judges.

* * * * *

(*b*) *Pretrial procedures.*

* * * * *

(*2*) *Initial appearance.*—At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

* * * * *

(E) the right to trial, judgment, and sentencing before a judge of the district court, unless the defendant consents to trial, judgment, and sentencing before a magistrate judge;

(F) unless the charge is a petty offense, the right to trial by jury before either a United States magistrate judge or a judge of the district court; and

* * * * *

(*3*) *Consent and arraignment.*

(*A*) *Trial before a United States magistrate judge.*—If the defendant signs a written consent to be tried before the magistrate judge which specifically waives trial before a judge of the district court, the magistrate judge shall take the defendant's plea. The defendant may plead not guilty, guilty, or with the consent of the magistrate judge, nolo contendere.

(*B*) *Failure to consent.*—If the defendant does not consent to trial before the magistrate judge, the defendant shall be ordered to appear before a judge of the district court for further proceedings on notice.

(*c*) *Additional procedures applicable only to petty offenses for which no sentence of imprisonment will be imposed.*—With respect to petty offenses for which no sentence of imprisonment will be imposed, the following additional procedures are applicable:

. . . . .

(*2*) *Waiver of venue for plea and sentence.*—A defendant who is arrested, held, or present in a district other than that in which the indictment, information, complaint, citation or violation notice is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the district in which the proceeding is pending, and to consent to disposition of the case in the district in which that defendant was arrested, is held, or is present. Unless the defendant thereafter pleads not guilty, the prosecution shall be had as if venue were in such district, and notice of the same shall be given to the magistrate judge in the district where the proceeding was originally commenced. The defendant's statement of a desire to plead guilty or nolo contendere is not admissible against the defendant.

. . . . .

(*d*) *Securing the defendant's appearance; payment in lieu of appearance.*

. . . . .

(*2*) *Notice to appear.*—If a defendant fails to pay a fixed sum, request a hearing, or appear in response to a citation or violation notice, the clerk or a magistrate judge may issue a notice for the defendant to appear before the court on a date certain. The notice may also afford the defendant an additional opportunity to pay a fixed sum in lieu of appearance, and shall be served upon the defendant by mailing a copy to the defendant's last known address.

* * * * *

(*g*) *Appeal.*

* * * * *

(*2*) *Decision, order, judgment or sentence by a United States magistrate judge.*

(*A*) *Interlocutory appeal.*—A decision or order by a magistrate judge which, if made by a judge of the district court, could be appealed by the government or defendant under any provision of law, shall be subject to an appeal to a judge of the district court provided such appeal is taken within 10 days of the entry of the decision or order. An appeal shall be taken by filing with the clerk of court a statement specifying the decision or order from which an appeal is taken and by serving a copy of the statement upon the adverse party, personally or by mail, and by filing a copy with the magistrate judge.

(*B*) *Appeal from conviction or sentence.*—An appeal from a judgment of conviction or sentence by a magistrate judge to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the clerk of court a statement specifying the judgment from which an appeal is taken, and by serving a copy of the statement upon the United States Attorney, personally or by mail, and by filing a copy with the magistrate judge.

* * * * *

PROPOSED AMENDMENT TO THE RULES GOVERNING PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE

Rule 8. Evidentiary hearing.

.   .   .   .   .

(*d*) *Production of statements at evidentiary hearing.*

(*1*) *In general.*—Federal Rule of Criminal Procedure 26.2(a)–(d), and (f) applies at an evidentiary hearing under these rules.

(*2*) *Sanctions for failure to produce statement.*—If a party elects not to comply with an order under Federal Rule of Criminal Procedure 26.2(a) to deliver a statement to the moving party, at the evidentiary hearing the court may not consider the testimony of the witness whose statement is withheld.

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 22, 1993, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1188. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, and 500 U. S. 1001.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 22, 1993

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Evidence that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 101, 705, and 1101.

[See *infra*, pp. 1191–1192.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1993, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 101. Scope.

These rules govern proceedings in the courts of the United States and before the United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 1101. Applicability of rules.

(*a*) *Courts and judges.*—These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

. . . . .

(*e*) *Rules applicable in part.*—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of misdemeanors and other petty offenses before United States magistrate judges;

. . . . .

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1192 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

TURNER BROADCASTING SYSTEM, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

ON APPLICATION FOR INJUNCTION

No. A–798. Decided April 29, 1993

The application of cable operators and programmers for an injunction barring enforcement of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992—which require cable operators to reserve a portion of their channel capacity for local commercial and noncommercial educational broadcast stations—is denied. Acts of Congress are presumptively constitutional and should remain in effect pending a final decision on the merits by this Court. Moreover, this Act was upheld by a three-judge District Court, which rejected applicants' argument that compelling them to carry signals of video programmers they would otherwise choose not to carry violates the First Amendment. Equally important, applicants are seeking an injunction rather than a stay of a lower court's order. The power to issue such extraordinary relief is to be used sparingly, only when necessary or appropriate in aid of this Court's jurisdiction and the legal rights at issue are indisputably clear. Implementation of §§ 4 and 5 would not prevent this Court's exercise of its appellate jurisdiction to decide the merits of applicants' appeal. Nor is it indisputably clear that applicants have a First Amendment right to be free of the must-carry provisions. This Court has not decided whether the activities of cable operators are more akin to that of newspapers—on whom must-carry provisions cannot be imposed—or wireless broadcasters—on whom regulation has been constitutionally imposed in the past.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicants have asked me, as Circuit Justice for the District of Columbia Circuit, to enjoin enforcement of §§ 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102–385, 106 Stat. 1471–1481, which require cable operators to reserve a portion of their channel capacity for carrying local commercial and noncommercial educational broadcast stations. Applicants, cable operators and programmers, contend that these "must-carry" provisions violate the First Amendment because (1) they tell cable operators what speakers they must carry, thereby controlling the content of the operator's speech and shrinking the number of channels available for programming they might prefer to carry; (2) they inhibit the operators' editorial discretion to determine what programming messages to provide to subscribers; and (3) they give local broadcast "speakers" a preferred status. I herewith deny the application.

The 1992 Cable Act, like all Acts of Congress, is presumptively constitutional. As such, it "should remain in effect pending a final decision on the merits by this Court." *Marshall* v. *Barlow's, Inc.*, 429 U. S. 1347, 1348 (1977) (REHNQUIST, J., in chambers). Moreover, the Act was upheld by the three-judge District Court, and even the dissenting judge rejected the argument now urged by applicants—that Congress may not compel cable operators to carry the video signals of programmers they would otherwise choose not to carry. 819 F. Supp. 32, 61 (D. C. 1993). Unlike applicants, therefore, all three judges below would recognize that the Government may regulate cable television as a medium of communication. *Ibid.*

Equally important is the fact that applicants are not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid Act of Congress. Unlike a stay, which temporarily suspends "judicial alteration of the status quo," an injunction "grants judicial intervention that has been withheld by the lower courts." *Ohio Citizens For Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers). By seeking an injunction, applicants request that I issue an order *altering* the legal status quo. Not surprisingly, they do not cite any case in which such extraordinary relief has been granted, either by a single Justice or by the whole Court.

The All Writs Act, 28 U. S. C. § 1651(a), is the only source of this Court's authority to issue an injunction. We have consistently stated, and our own Rules so require, that such power is to be used sparingly. See, *e. g., Ohio Citizens For Responsible Energy, supra,* at 1313; this Court's Rule 20.1 ("The issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise. This factor is all the more important where, as here, a single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires." *Heart of Atlanta Motel, Inc.* v. *United States,* 85 S. Ct. 1, 2, 13 L. Ed. 2d 12, 14 (1964) (Black, J., in chambers).

An injunction is appropriate only if (1) it is "necessary or appropriate in aid of [our] jurisdictio[n]," 28 U. S. C. § 1651(a), and (2) the legal rights at issue are "indisputably clear," *Communist Party of Indiana* v. *Whitcomb,* 409 U. S. 1235 (1972) (REHNQUIST, J., in chambers); *Ohio Citizens For Responsible Energy, supra,* at 1313. Without doubt, implementation of §§ 4 and 5 would not prevent this Court's exercise of its appellate jurisdiction to decide the merits of applicants' appeal. Nor is it "indisputably clear" that applicants have a First Amendment right to be free of the must-carry provisions. In *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241 (1974), we struck down Florida's right of reply statute, holding that the State may not compel "editors or publishers to publish that which reason tells them should not be published." *Id.,* at 256 (internal quotation marks omitted). Under *Tornillo,* Congress plainly could not impose the must-carry provisions on privately owned newspapers. In *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367

(1969), however, we upheld the Federal Communications Commission's requirement that broadcasters cover public issues, and give each side of the issue fair coverage. Noting that there is a finite number of frequencies available, we stated that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Id.*, at 390. Although we have recognized that cable operators engage in speech protected by the First Amendment, *Leathers* v. *Medlock*, 499 U. S. 439, 444 (1991); *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986), we have not decided whether the activities of cable operators are more akin to that of newspapers or wireless broadcasters. *Id.*, at 494–495.

In light of these two lines of authority, it simply is not indisputably clear that applicants have a First Amendment right to be free from Government regulation. The application for an injunction pending appeal to this Court is therefore denied.

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